Submitted Dec 22 73 — 19-58 Mr Justice Davis Portland

What is [illegible] can the personal service [illegible] a resident in a foreign [illegible] be deemed?

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

Revered — No. 477 Bradley Curtis

ALFRED H. KNOWLES, PLAINTIFF IN ERROR,

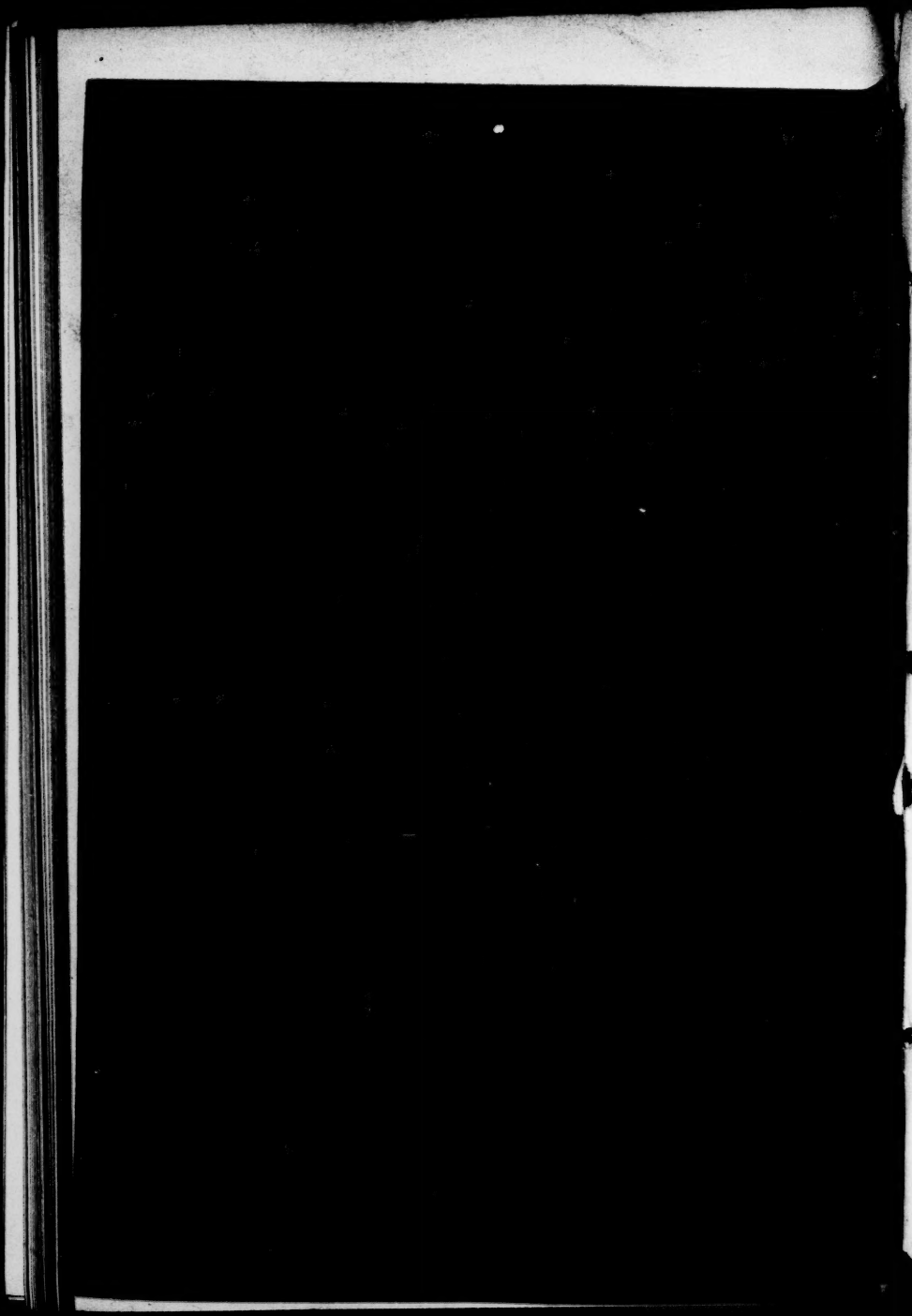
vs.

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 20, 1873.

Oct. T. 1873



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eighth circuit and district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said circuit court before you, between The Logansport Gas-light & Coke Company, and Alfred H. Knowles & Thomas Harvey, a manifest error hath happened, to the great damage of the said Alfred H. Knowles, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said

2 Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States this 18th day of February, in the year of our Lord 1873, and of the Independence of the United States the ninety-seventh.

[SEAL.] H. E. MANN,
Clerk of the U. S. circuit court, district of Minnesota.

Allowed. JNO. F. DILLON,
Circuit Judge.

(Indorsed:) Supreme Court of the United States. Alfred H. Knowles pl'ff in error, vs. The Logansport Gas-light & Coke Co., def't in error. Writ of error. Filed February 18, 1873, H. E. Mann, clerk. Horace R. Bigelow, pl'ff in error

3 The answer of the judges of the circuit court of the United States for the district of Minnesota in the eighth circuit in the within writ mentioned.

The record of proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States within mentioned in a certain schedule to this writ annexed, as within it is commanded.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

[SEAL.] H. E. MANN, *Clerk.*

4 UNITED STATES OF AMERICA, *ss:*

To The Logansport Gas-light & Coke Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second

Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit and district of Minnesota, wherein Alfred H. Knowles is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States this 18th day of February, in the year of our Lord 1873.

[SEAL.] JNO. F. DILLON,
Circuit Judge.

5 DISTRICT OF MINNESOTA, *ss:*

Charles E. Flandrau, being duly sworn, deposes and says, that on the 25th day of February, A. D. 1873, deponent served the within citation on Messrs. Cornell & Bradley, attorneys for the within named defendant in error, at the city of Minneapolis, in said district, by then and there exhibiting to them the within citation, and handing to and leaving with them a true copy thereof, and that deponent well knows the said Cornell & Bradley so served to be the attorneys for said def't in error.

CHAS. E. FLANDRAU.

Subscribed and sworn before me this 25 day of Feb'y, 1873.

[SEAL.] H. E. MANN, *Clerk.*

(Indorsed:) Supreme Court of the United States. Alfred H. Knowles, pl'ff in error, vs. The Logansport Gas-light & Coke Co., def't. in error. Citation and aff. of service. Filed Feb'y 25, 1873, H. E. Mann, clerk. Personal service of the within citation is admitted this 25th day of February, 1873, Cornell & Bradley, pl'ffs att'ys, Horace R. Bigelow, att'y for pl'ff in error.

6 Schedule referred to in return to writ of error.

UNITED STATES OF AMERICA:

United States circuit court, district of Minnesota.

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY
vs.
ALFRED H. KNOWLES AND THOMAS HARVEY.

The plaintiff in the above-entitled action, for its cause of action against defendants, herein respectfully shows to the court and states that said plaintiff was, prior to the rendition of the judgment herein declared, and has ever since been and now is a corporation, duly created, organized, and existing under and by virtue of the laws of the State of Indiana, and has been all of said time, and still is a citizen of said State; that said defendant, Alfred H. Knowles, is a citizen and inhabitant of the State of Minnesota; that, heretofore, to wit, in the Cass County circuit court, in and for the county of Cass and State of Indiana, at a term of said court, begun and held at the court-house in the city of Logansport, in said county of Cass, on the second Monday, being the fourteenth day of November, A. D. 1870, and on the twenty-fifth judicial day of
7 December, A. D. 1870, the said plaintiff, by the consideration and judgment of the said court, recovered against said defendants, Alfred H. Knowles and Thomas Harvey, the sum of seven thousand eight hundred and fifty dollars, which said sum was then and there by

said court adjudged to be due from said defendants to said plaintiff by reason of the premises alleged in complainant's complaint in the action wherein said judgment was rendered, as by the record and proceedings in said action in said court fully appears, and it was by said court adjudged that plaintiff do have and recover of and from the said defendants, Alfred H. Knowles and Thomas Harvey, the sum of seven thousand eight hundred and fifty dollars, and the costs of said suit paid, laid out, and expended; which said judgment was duly given and made, and remains in full force, unreversed and unsatisfied, and plaintiff hath not obtained any satisfaction of said judgment, but that defendants, though often requested, have not paid said judgment, nor any part thereof.

And plaintiff avers that said Cass County circuit court, in which said judgment was rendered, as aforesaid, was, at the time of the rendition thereof, has ever since been, and now is, a court of general juris-
8 diction, and had jurisdiction of the parties to and the subject-matter of said action.

Wherefore plaintiff demands judgment of said defendants for the sum of seven thousand eight hundred and fifty dollars, and interest at the rate of six per cent. per annum from and after the 13th day of December, A. D. 1870, and for the costs and disbursements of this action.

CORNELL & BRADLEY,
Pl'ff's Attorneys, Minneapolis, Minn.

STATE OF MINNESOTA,
County of Hennepin, ss:

George Bradley, being duly sworn, doth depose and say that he is one of the firm of Cornell & Bradley, plaintiff's attorneys in the above-entitled action; that the foregoing pleading is true, to the best of his knowledge, information, and belief; and that the reason why this affidavit of verification is not made by said plaintiff is that it and each of the persons comprising it are absent from the county of Hennepin, in the State of Minnesota, where its said attorneys reside.

GEO. BRADLEY.

Subscribed & sworn to before me this 25th day of April, 1871.
[SEAL.]
F. B. CORNELL,
Notary Public, Hennepin Co., Minn.

(Indorsed:) United States circuit court, district of Minnesota. The Logansport Gas-light & Coke Company vs. Alfred H. Knowles and Thomas Harvey. Complaint. Filed April 26, 1871. H. E. Mann, clerk, by W'm A. Spencer, dep'y. Cornell & Bradley, att'ys for pl'ff, Minneapolis, Minn.

9 *Summons.*

UNITED STATES OF AMERICA,
District of Minnesota, ss:

In the circuit court of the United States for the district of Minnesota.

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY
against
ALFRED H. KNOWLES AND THOMAS HARVEY.

The President of the United States of America to the defendants above named, greeting:

You are hereby summoned and required to answer the complaint in

this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey, and State of Minnesota, and file your answer in said clerk's office, within thirty days after the service thereof, excluding the day of such service; and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of seven thousand eight hundred and fifty dollars, with interest, at the rate of six per cent. per annum, from and after the 13th day of December, A. D. 1870, and for the cost and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this 26th day of April, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the ninety-fifth year.

[SEAL.] H. E. MANN, *Clerk*,
By W'M A. SPENCER, *Dep'y.*

CORNELL & BRADLEY,
Plaintiff's Attorneys.

DISTRICT OF MINNESOTA, *ss:*

10 I hereby certify that I served the within summons on the within-named Alfred H. Knowles, personally, at Minneapolis, in said district, April 29, 1871, and that the defendant, Thomas Harvey, cannot be found in my district.

Fees, $5.50.

AUG. ARMSTRONG,
By A. B. BRACKETT, *Dep'y.*

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that the within is a true copy of the original summons delivered to me for service.

_____ _____,
U. S. Marshal.

(Indorsed:) United States circuit court, district of Minnesota, No. —. The Logansport Gas-light and Coke Company, plaintiff, vs. Alfred H. Knowles and Thomas Harvey, defendants. Summons. Filed May 1, 1871. H. E. Mann, clerk. Cornell & Bradley, plaintiff's attorneys.

11 *Answer.*

United States circuit court, district of Minnesota.

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY
vs.
ALFRED H. KNOWLES AND THOMAS HARVEY.

The defendant, Alfred H. Knowles, for his separate answer to the complaint of the plaintiff in the above-entitled action, states and shows to the court that he has no knowledge or information thereof sufficient to form a belief as to whether the said plaintiff was at the time or times stated in said complaint, or at any other time, a corporation duly or otherwise created, organized, or existing under and by virtue of the

laws of the State of Indiana or otherwise, or as to whether the said plaintiff was at the time or times stated in said complaint, or at any other time, a citizen of said State of Indiana, and he therefore leaves the said plaintiff to make such proof concerning the same as it may be advised.

Defendant admits that he is a citizen and inhabitant of the State of Minnesota, as alleged in said complaint. And defendant denies
12 that in the Cass County circuit court, in and for the county of Cass and State of Indiana, at a term of said court, begun and held at the court-house in the city of Logansport, in said county of Cass, on the second Monday, being the fourteenth day of November, A. D. 1870, and the twenty-fifth judicial day of said term, to wit, the thirteenth day of December, 1870, or on any other day in said term or otherwise, the said plaintiff by the consideration or judgment of said court recovered against this defendant and Thomas Harvey, named in said complaint, or either of them, the sum of $7,850, or any sum or sums whatever; and denies that said sum of $7,850, or any other sum, was then and there at the time and place mentioned in said complaint, or at any other time and place, by said court adjudged to be due from this defendant and said Thomas Harvey jointly or otherwise to said plaintiff for the reason stated in said complaint or otherwise; and denies that it was by said court adjudged that the plaintiff herein do have and recover of and from the said defendants, Alfred H. Knowles and Thomas Harvey, or either of them, the sum of $7,850, and the costs of said suit in said complaint mentioned, or any other sum or sums whatever, as is alleged in said complaint or otherwise, and denies that the pre-
13 tended judgment mentioned in said complaint was duly given, or made, or remains in full or any force; and defendant has not any knowledge or information thereof sufficient to form a belief as to whether said pretended judgment remains unsatisfied or unreversed, or whether the said plaintiff has ever obtained any satisfaction of the same, and leaves said plaintiff to make such proof thereof as it may be advised, but defendant denies that he has ever been requested to pay said pretended judgment or any part thereof.

And defendant has no knowledge or information thereof sufficient to form a belief as to whether the said Cass County circuit court in which said pretended judgment is alleged in said complaint to have been rendered was at the time of the pretended rendition thereof or ever was or is now a court of general jurisdiction or had jurisdiction of the subject of said pretended action; and defendant denies that said court ever had jurisdiction of the person of this defendant in said pretended action as alleged in said complaint or otherwise, and denies that said court ever had jurisdiction of this defendant by the service of any process on this defendant in said action, or by the appearance of this defendant in said action in person or by attorney or in any other manner whatever.

14 Second. And for a second and further defense to said action this defendant says and avers that in the said pretended action stated in the complaint herein alleged to have been commenced in the Cass circuit court in the State of Indiana, the said plaintiff attempted to commence said action against one John N. Bain, and this defendant and the said Thomas Harvey on a contract for the construction of certain gas-works in the city of Logansport in said State of Indiana. That the cause of action and complaint set up in said action by the plaintiff therein was as follows, to wit:

"Cass circuit court.—In February term, 1866.

"THE STATE OF INDIANA, *Cass County:*

"The Logansport Gas-light and Coke Company, plaintiffs in this suit complain of John W. Bain, Alfred H. Knowles and Thomas Harvey, defendants to this suit, and show to the court by this amended complaint which is filed in the place of the original complaint, filed in this court in September 18, 1865, the following as their cause of action, to wit:

"On the 13th day of September, 1862, the said defendant, under the name, firm, and style of Thomas Harvey & Co., made and entered into a written contract, a copy of which, with the names of the subscribers thereto, is filed herewith and made part of this complaint, marked Exhibit A, and is in the words and figures following:

15 "EXHIBIT A.

"Article of agreement, made this 13th day of September, 1862, between Thomas Harvey and Alfred H. Knowles, of the firm of T. Harvey & Co., of Marion, Ohio, of the first part, and the parties whose names are hereto subscribed of the second part, witnesseth:

"That the first party, T. Harvey & Co., on their part agree to furnish gas such as is usually manufactured for light in the State of Ohio from coal. To furnish convenient grounds and construct thereon suitable buildings and fixtures, machinery, and apparatus of good material and workmanship for the manufacture of said gas, and of sufficient capacity to manufacture and supply gas for four hundred consumers. To furnish and lay down six thousand feet of main pipe of cast iron of proper size and proportion, and wrought-iron service-pipes to the line of the lot required for one hundred consumers, and if consumers of more than this number can be obtained before October 1, 1863, then for the additional number also. To furnish all street-boxes, stop-cocks to said consumers on the outer line of the streets of the city of Logansport, Indiana.

16 The foundations of the retort and purifying building to be of stone and the walls of the same to be of stone or brick. The roof of the retort-house to be of slate and supported on iron frames, the lime and coal house to be constructed of wood. To construct two benches of retorts with two retorts on each bench, with all necessary apparatus, to be furnished with four purifiers and all necessary fixtures and apparatus. The gasometer to be 30 feet in diameter by 12 feet deep, with all necessary fixtures for counter-balance, &c. The tank to be built of good hard-burnt brick or stone laid up in cement thirty-three feet in diameter and twelve feet deep, and seventy-five meters. The whole to be finished and completed on or before Oct. 1st, 1863.

"And said party of the first part is to furnish said ground and construct said works, fixtures, and apparatus and warrant their proper and successful operation at their own proper cost and charges, and to take the title therefor in their own name in trust for the Logansport Gas-light and Coke Company, and under the ordinance passed by the common council of Logansport, Indiana, August 21, 1862, and other proceedings necessary to keep good said ordinance for benefit of the subscribers hereto, they authorizing the first party so to do.

17 "Said T. Harvey & Co. at the completion of said work shall convey to said stockholders all said real estate and fixtures of every kind in such form of deed as the stockholders hereto subscribed shall by a vote of a majority of the stock determine.

"And the parties of the second part, whose names are hereto subscribed, in consideration of the premises, do severally agree and promise to pay to the first party the sums set opposite their respective names in installments, as follows:

"10 per ct. November 1, 1862.
"20 " " January 1, '63.
"20 " " March 1, '63.
"20 " " April 1, '63.
"30 " " at completion of the works.

"And it is mutually agreed between the parties hereto that they shall, and do hereby, constitute themselves into a joint stock-company, under the name of the Logansport Gas-light and Coke Company. That the capital stock shall be $25,000, to be divided into shares of $25.00 each. If the said amount of $25,000 be not subscribed within 30 days, it shall be at the option of said first party to go on with the work or not on the capital stock which may be subscribed, retaining the balance of the stock themselves; and when the parties of the second part shall have paid the amount they respectively subscribed hereto, as shall be
18 shown by receipts and vouchers, signed by T. Harvey & Co., they shall be joint owners of said gas-works, buildings, structures, pipes, fixtures, &c., &c., in proportion to the amount of their respective subscriptions. It is further agreed between the parties that at completion of the works, if the second party hereto shall, by a majority of the stock, require the first party to rent said works and all fixtures pertaining thereto for the sum of twenty-five hundred dollars for one year from the date of said completion, then the first party shall so do.

"It is further agreed, however, that in event of this lease the first party shall have the refusal of the said works, &c., &c., for the two years following said lease at the same rate per year, viz, $2,500.

"THOMAS HARVEY & CO.

"Subscribers' names: J. W. Bain, 10,000.00; J. W. Bain, (real estate,) 1,000.00; J. W. Bain, 1,750.00; and forty other individuals and firms in various sums, amounting in all to $.

"The following subscriptions draw 10 per ct. annually, commencing from date of their several payments to Harvey & Co.; that is in case the works are rented to said Harvey & Co. at that rate, but if the
19 stockholders elect to hire them themselves, then the subscribers hereto shall fare as do the original stockholders as to dividends, and in all other matters and respects.

"J. W. Bain $1,250, and four others in sums amounting in all to $2,750, among whom were Thomas Harvey & Co. $500.

"The said defendant, Bain, was one of the subscribers to said original and also the supplemental contract set out in said exhibit; said Bain was also at the same time a secret partner of the said firm of Thomas Harvey & Co., but that fact was unknown to the other subscribers to such contract.

"Pursuant to said written contract or article of agreement the stockholders of the same did, on or about the 25th day of May, 1863, organize themselves into a company under the provisions of a law of said State, approved May 20, 1852, entitled "An act for the incorporation of manufacturing and mining companies, and companies for mechanical, chemical, and building purposes," and the laws of said State amendatory of said act, and made the certificate in writing contemplated in said law, adopting as their name "The Logansport Gas-light and Coke
20 Company;" and said organization formed pursuant to said written agreement and contract, the said subscribers who made said con-

tract with Thomas Harvey & Co., have been regularly engaged since so becoming a corporation in the manufacture of gas and coke from coal, and in supplying illuminating gas to consumers within the city of Logansport, where the plaintiff's works are situated.

"And the plaintiffs aver, that said subscribers to the stock of said company have all paid the said several sums so subscribed by them, with the exception of the said defendants, who have not, any of them, paid any sum whatever of the sum so subscribed by the defendant Bain, and by the firm of T. Harvey & Co., which latter firm was composed, as above stated, of said defendants.

"And the plaintiff further avers that all the subscribers to said contract, except the defendants, were citizens of said county of Cass, residing in Logansport, and have no practical knowledge of the manufacture of gas, or of the cost of the necessary works and machinery to manufacture and supply gas, or of the number and size of retorts necessary to supply 400 consumers, or of the proper size of the gasometer to contain the necessary quantity of gas to supply that number of consumers, or of the mode in which the benches for the retorts should be con-
21 structed, or of the size of the pipes proper to conduct the gas from the gas-works to the different parts of said city, and relied for information upon all and singular those matters, upon the said defendants. The said Bain represented himself as the friend of the said Harvey & Knowles as their creditor, as having been concerned with them in the construction and operation of gas-works in Marion, Ohio, and as anxious to aid them in the business, and professing to have the greatest confidence in the profitableness of gas-works in the city of Logansport, proposed to take ten thousand dollars of stock in the company himself.

"The said Bain wrote said contract, and was the canvasser to obtain the other subscriptions, all the time purposely, and with the view of deceiving and defrauding the other subscribers, studiously and deceitfully concealing his own relation as a partner with the said Knowles and Harvey in said contract.

"The defendants have been engaged in the business of building gas-works and the manufacture of gas, and well knew how proper gas-works should be built, and the cost of the same, and well knew that the other subscribers were ignorant upon these matters, and relied wholly
22 upon their representations. Thus it was that the said defendants caused the said other subscribers to believe that it was worth the sum of twenty-five thousand dollars to do and perform all and singular the things which the said firm of Thomas Harvey & Co. agreed to do by said contract. And thus it was that the defendants caused the other subscribers to believe that two benches of retorts with two retorts in each bench were sufficient to manufacture gas to supply 400 consumers, and thus it was that the defendants caused the subscribers to believe that a gasometer of 30 feet in diameter by 12 feet depth was of sufficient capacity to supply that number of consumers with gas, and that a tank 33 feet in diameter and twelve feet depth was of proper capacity. Whereas in truth and in fact the plaintiff avers that the proper cost of such gas-works as the defendants thus agreed to construct, with all fixtures, apparatus, and lands, and including all the said defendants agreed in and by said contract to perform, was not more than ten thousand dollars. And whereas, in truth and in fact, three benches of retorts, with three retorts in each bench, were necessary to manufacture gas to supply 400 consumers. And whereas, in truth and in fact, a gasometer of forty feet and 18 feet in depth was necessary.

"And the plaintiff avers that the said Bain purchased and pro-

23 cured the title to be made to himself, the ground upon which said gas-works are situate, and afterwards conveyed said ground to said company, but the plaintiff avers that said ground was insufficient in quantity.

"And the said plaintiff avers that the said defendants have failed to comply with their said contract in the following particulars, to wit: The buildings constructed by said defendants are not suitable. They are too small in size and unskillfully and insufficiently constructed. They are not of sufficient capacity to manufacture and supply gas for four hundred consumers. The defendants failed to furnish and lay down six thousand feet of main pipe of cast iron of proper size and proportions. The defendants wholly failed to provide and furnish a station meter which was a proper and necessary fixture of said gas-works, demanded by said contract, and the cost of which and setting the same is the sum of five hundred dollars. The defendants caused the main pipes to be laid with fault and improper joints, whereby the gas passing through the same largely escapes. The main pipes were also
24 defective, whereby gas escaped. The main pipes were not laid sufficiently deep, but laid near the surface of the ground and within the reach of frost. The hydraulic main is not suitable and should be more substantial. It should be put together with wrought-iron bolts 8 or 10 in number, the end of the hydraulic having flanges for that purpose, whereas the defendants made the joints without cement, in consequence of which they are continually leaking. The purifying boxes in said gas-works are imperfect, two of them in this, that the inlet comes from the top, causing the gas to be forced down through the lime, whereas the same should come from the bottom that the gas might flow of itself to the top and thence to the gasometer without loss. The condensers in said gas-works are too small, making them liable to stop up with tar. They should have been larger by at least two inches. The lime-trays in the purifying boxes are made of wood and are apt to swell, closing the open spaces made for the gas to pass through the lime and had to be removed from the boxes. The trays should have been made of iron. There should have been three benches of retorts with three retorts to each bench, instead
25 of two benches and four retorts. The retort benches built by the defendants were weakly built and imperfectly constructed, the outside wall being but 8 inches thick, when it should have been sixteen inches. The upright iron braces and bars were not of sufficient strength or fastened at the end with nuts as they should have been. The arches were unskillfully built and gave way after the use of four months, whereas they should have lasted ten years if properly built, and in consequence of this imperfection the said company lost two retorts of the value of $800, and consumed a large quantity of coal unnecessarily, and said company never was able to supply their consumers with gas, and were obliged to put in new retorts and new benches at a cost of one thousand dollars.

"Said works were not large enough to supply more than 200 consumers. The gasometer and tanks are too small; the main pipe and way-pipe are too small for that purpose. The retort-house is too small by six feet in width and ten feet in length. The drips should have been iron cast boxes holding at least ten gallons of water, and not less than six of said boxes should have been used in the pipe laid by said defendants.
26 The drips now consist of ¾-inch pipes. In consequence of this defect the company have lost much gas and been put to great expense, and the gas-works are liable to explosion. The defendants

placed outlets instead of stop-cocks in the service-pipe, in consequence of which there is and has been great leakage of gas, and it is necessary for the plaintiff to trench and replace them.

"The defendants neglected to provide any means of ventilation over the purifiers, whereby the roof became eaten by the gas and destroyed, and said company were obliged to substitute a new roof at a cost of $1,200.

"The defendants failed to supply seventy feet of pipe to convey steam from the boiler to the tank, and 70 feet of pipe to convey water from the canal to the boiler, which pipe necessarily supplied cost the sum of two hundred dollars.

"The defendants failed to supply good and sufficient service-cocks, substituting meter-cocks, whereby a great amount of gas was wasted and the company sustained much loss. Said defendants did not observe and keep their warranty as to the successful operation of said works, fixtures, and apparatus. The same could not be operated successfully, by
27 reason of the defects, imperfections, and shortcomings aforesaid; and the plaintiff avers that said company and said subscribers to said contract (except the defendants) have done and performed all that was required of them in and by said contract. And the plaintiff avers that in and by said frauds, misrepresentations, concealments, and grievances aforesaid, and the failure of the defendants to perform their said contract, the plaintiffs have sustained damage to the amount of ten thousand dollars, which sum is justly due to the plaintiffs from the defendants and remains wholly unpaid. Wherefore the plaintiff demands judgment against the defendants for the sum of ten thousand dollars and other proper relief."

And this defendant says that he had at the time of the pretended commencement of said action, and has now, a good and substantial defence on the merits to said cause of action so set out in said action in said Cass circuit court, and to the whole thereof, arising out of the following facts, to wit: He admits the making of the contract set up in said action, and avers that he and the said Harvey entered upon the erection of the gas-works named in said complaint and contract, and erected and constructed the same in all things in exact accord-
28 ance with the terms and requirements, and fully in all things completed the same by the time in which the same were by said contract agreed to be completed, and when completed duly delivered the same to the said plaintiffs, and the same were by the said plaintiffs duly accepted and paid for without objection, and with full knowledge of all the facts concerning the same. And said defendant further avers that after the said works were by the said Harvey and this defendant completed and delivered and accepted as aforesaid, the said Harvey & Knowles leased the said gas-works from the said plaintiff in pursuance of the terms of said contract, for one year from the time when the same were completed and delivered and accepted by the said plaintiff as aforesaid, at the stipulated rent of $2,500 per year, as agreed upon in said contract, and entered into the possession of the said gas-works under said lease, and run and operated the same under said lease to the full satisfaction of the said plaintiff and all persons concerned, for the space of nine months, and paid the rent to the said plaintiff for the same during said time, and in all things did and performed all that was
29 agreed to be done and performed by them under said contract and said lease, and that at the expiration of the said nine months as aforesaid the said plaintiff applied to said Harvey & Knowles for a surrender to said plaintiff of the remainder of said term under said

lease, and it was then and there, at Logansport aforesaid, agreed by and between the said Harvey & Knowles and the said plaintiff, for a valuable and sufficient consideration, that the said Harvey & Knowles should surrender the balance of said unexpired term of said lease to the plaintiff, and the same was for such consideration duly surrendered to the said plaintiff, and that said plaintiff then and there again accepted the said gas-works from the said Harvey & Knowles, and took possession of the same, and did duly release and discharge this defendant and said Harvey from all liabilities growing out of said contract.

And this defendant denies that John W. Bain in the complaint in said action in said Cass County reviewed, was a partner of said Harvey & Knowles in the construction of said gas-works, as alleged in said complaint or otherwise, and avers that each and every allegation, matter and thing, in the said complaint in said action in said Cass
30 County contained, except as herein above admitted, and except also the allegation in said last-named complaint that the defendants, Harvey & Knowles, had been engaged in the business of building gas-works and the manufacture of gas, and well knew how proper gas-works should be built and the cost of the same, are wholly untrue; and avers that both before and after the supposed commencement of said action against this defendant the said plaintiff, well knowing that this defendant had such good and substantial defence to the merits of said action, by its duly authorized agents came to this defendant, and, with intent to deceive and defraud this defendant and prevent him from appearing and defending said action falsely and fraudulently to this defendant that it would not prosecute the said action against this defendant, and that this defendant was only necessary as a defendant of record in said action so that a judgment could be recovered against the said defendant John W. Bain in said action, and that said plaintiff had no cause of action or complaint against this defendant and claimed no right to recover against him, and would not proceed against any of the defendants in said action, except the said defendant
31 Bain. That relying on the said representations of the said plaintiff, and believing them to be true, this defendant omitted to appear in said action and defend the same, as he otherwise would have done, or to inform himself of the nature of said action, which he did not know until long after said pretended judgment is alleged to have been recovered; and that the said plaintiff, disregarding his said representations so made to this defendant as aforesaid, thereafter, and without the knowledge of or any notice to this defendant, proceeded against this defendant in said action and procured and recovered against this defendant the said supposed and pretended judgment therein with intent to defraud this defendant and not otherwise.

Wherefore this defendant prays that the said plaintiff take nothing by his said action, and that this defendant may be hence dismissed with his costs of suit.

BIGELOW, FLANDRAU & CLARK,
Att'ys for Def't, Alfred H. Knowles.

STATE OF MINNESOTA,
County of Hennepin, ss:

Alfred H. Knowles, being duly sworn, deposes and says that he
32 is one of the defendants in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters

which are therein stated on his information and belief, and as to these matters he believes the same to be true.

ALFRED H. KNOWLES,

Subscribed and sworn before me this 26th day of May, A. D. 1871.
[SEAL OF COURT.] H. E. MANN,
Clerk.

(Indorsed:) United States circuit court, district of Minnesota. The Logansport Gas-light and Coke Company *vs.* Thomas Harvey and Alfred H. Knowles. Separate answer of def't, Alfred H. Knowles. Filed May 26, 1871. H. E. Mann, clerk. Bigelow, Flandrau & Clark, att'ys for def't Knowles.

33 Circuit court of the United States for the district of Minnesota.

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY *vs.* ALFRED H. KNOWLES AND THOMAS HARVEY. } October term, 1871.

It is hereby stipulated and agreed that a jury trial in the above-entitled action be, and the same is hereby, waived, and that the said action and all the issues therein may be tried and determined by this court.

Dated Oct. , 1871.

CORNELL & BRADLEY,
Pl'ff's Att'ys.
BIGELOW, FLANDRAU, & CLARK,
Def'ts' Att'ys.

(Indorsed:) U. S. circuit court, Minn. The Logansport Gas-light and Coke Company *vs.* Alfred H. Knowles & Thomas Harvey. Stipulation waiving jury trial. Filed Oct. 18, 1871. H. E. Mann, clerk.

34 Circuit court of the U. S. for the district of Minnesota. Oct. term, 1871. 3d day, Oct. 18, 1871.

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY *vs.* ALFRED H. KNOWLES AND THOMAS HARVEY.

It is hereby stipulated by the parties hereto, by and with the consent of the court, that the trial of this action be set for the 20th day of November, 1871, by the court at chambers of Hon. R. R. Nelson at ten a. m. of that day.

The decision and judgment to be nunc pro tunc as of the present term of this court.

Dated Oct. 18, 1871.

CORNELL & BRADLEY,
Pl'ff's Att'ys.
BIGELOW, FLANDRAU & CLARK,
Att'ys for def't Knowles.

(Indorsed:) U. S. circuit court, Minn. The Logansport Gas-light and Coke Company vs. Alfred H. Knowles and Thomas Harvey. Stipulation setting cause for trial. Filed Oct. 18, 1871. H. E. Mann, clerk.

35 United States circuit court, district of Minnesota. Oct. term, 1871.

THE LOGANSPORT GAS-LIGHT & COKE CO.
vs.
ALFRED H. KNOWLES AND THOMAS HARVEY.

A jury trial is waived, and in accordance with the act of Congress, a stipulation being on file, the court proceeds to try the issues.

This is an action on a judgment obtained in the circuit court of Cass County, Indiana, on the 13th day of December, 1870, for the sum of seven thousand eight hundred and fifty dollars.

The plaintiff, after introducing a copy of *of* the articles of association, with the certificates attached of the recorder of the county and the secretary of state, produced a certified copy of the record in the suit in the State court, showing all the proceedings down to the final judgment, and rested.

The summons, as appears from the record, is as follows:

"The State of Indiana to the sheriff of Cass County:

"You are hereby commanded to summon John M. Bain, Alfred H. Knowles, and Thomas Harvey to appear in the Cass circuit court on the second day of the next term thereof, to be held at the court-house in Logansport on the fourth Monday in February, 1866, then and
36 there to answer the complaint of the Logansport Gas-light and Coke Company. Amount demanded, $3,000; and of this summons make due return.

"Witness the clerk and seal of said court, this 18th day of September, 1865.

"[SEAL.] HORACE M. BLISS, *Clerk.*"

The return of the sheriff was in the following words:

"I do hereby certify that I served the within writ on the 19th day of September, 1865, upon Alfred H. Knowles and Thomas Harvey, personally, by reading the same to them; and I further certify that John M. Bain cannot be found in my bailiwick.

"JOHN DAVIS,
"*Sheriff of Cass Co.*,
"By JAMES STANLEY,
"*Deputy.*"

The defendants interpose several objections to the reception of the copy of the articles of association as proof of incorporation, and also to a recovery upon the record introduced.

I obj.—They urge that the copy of the articles of association have not been properly filed and recorded, under the law of Indiana, so as to create the plaintiff a corporation.

The plaintiff, by law, when the articles of association were signed, was required to "file the same in the office of the recorder of the county, which shall be placed on record, and a duplicate thereof, in the office of the secretary of state." This it has done, but it is claimed by the
37 defendants that the duplicate filed in the office of the secretary of state was a certified copy and not a duplicate original.

There is nothing in the law passed for the incorporation of companies requiring original articles of association to be filed in the office of the secretary of state, (Vol. 2, Rev. Stat. Ind., chap 60.) The word dupli-

cate, although sometimes used to express an original repeated, usually signifies a copy or transcript of an instrument, and in my opinion this ordinary definition of the word is to be given to it in this chapter.

II obj.—The defendants further urge that the copy offered is not authenticated so as to permit its reception as evidence. The copy has been certified to by the recorder of the county where filed, and accompanying it is a certificate of the secretary of state that it is a correct transcript of a certified copy in his office. True it is not authenticated in accordance with the act of Congress of 1804, but I do not understand that this act excludes every other mode of authentication, or abrogates any principle of jurisprudence previously established. It is the settled rule that when a copy of an instrument is certified to by the officer whose duty it is by law to keep the original on file in his office, it must be read in evidence of the original, (7 Peters, 53; 20 Howard, 235.) The copy here is indorsed with such a certificate, and is admissible under the above rule.

38 III obj.—The defendants make the further objection that the record of the judgment does not show that the service of the summons was made within the jurisdiction of the sheriff by whom it was made.

The proof of service of process issued by any court, or any notice required to be served, can be made by a certificate of the sheriff when served by him, and it is not necessary for him to state the time and place of service, (Rev. Stat. Ind., vol. 2, sec. 292, page 96.) Sec. 34, page 35, enacts that the summons shall be issued by the clerk, under the seal of the court, and directed to the sheriff, and shall notify the defendant of the action commenced, the parties thereto, and the court when pending. By sec. 35 the summons may be served personally upon the defendant, and sec. 36 provides that no summons nor the service thereof shall be deemed insufficient if there is sufficient substance about either to inform the party served that an action is instituted against him in court.

These provisions, it seems to me, fully answer the objection raised as to the jurisdiction of the court which rendered the judgment sued upon over the persons of the defendants.

IV obj.—The defendants claim, also, that there should be no recovery because the record shows that the only summons pretended to have been served upon the defendants was one claiming $3,000, and that judgment was rendered for a greater sum.

39 The complaint of the plaintiff which sets forth in detail the cause of action against the defendants claims damages for ten thousand dollars, which is an amount larger than the judgment obtained, and under the peculiar practice in Indiana, it appears that the summons though issued by and under the seal of the court is regarded as a mere notice to the defendants that a suit has been instituted.

By sec. 1, page 34, Rev. Stat. Ind., vol. 2, it is enacted "That in all proceedings * * in civil actions the following forms may be used and are sufficient," &c. Form No. 37, for "summons," is the same as set forth in the record introduced without a demand for damages. I think this section and the form given in connection with sec. 36, p'g' 35, gave the court jurisdiction complete to render such a judgment as they have done, for there can be no controversy about the jurisdiction over the subject-matter of the suit.

Under the code practice in some of the States a return of a sheriff upon service of the summons, such as was made in this case, would not be good. The statutes of both New York and Minnesota enact that in

case of service by the sheriff, the "certificate shall state the time, place, and manner of service."

In the federal courts, under the statute conferring jurisdiction, it has been held necessary for the marshal to set forth in his return upon process where the service took place, (I Bl., p'g' 487,) but in Indiana
40 a return in the form set forth in the record is good. So in Ohio and Iowa, 3 Ind. Rep., pg. 316; 11 do., pg. 346; 13 do., pg. 536; 16 Ohio, p. 371; 7 Iowa, p. 42.

In Indiana, also, upon failure to answer, the court may hear the proof, and in actions founded on contract assess the damages and render judgment; and the relief granted to the plaintiff, if there be no answer, is limited only by the relief demanded in the complaint, (Rev. Stat. Ind., vol. 2, sec. 380, pg. 123.)

In view of these provisions of the Indiana statute, I think the plaintiff is entitled to judgment for the amount claimed in its complaint, to wit, eight thousand two hundred and sixty dollars and ten cents, with costs to be taxed.

Nov. 6, 1871.

R. R. NELSON,
Judge.

CORNELL & BRADLEY,
For Plaintiff.
BIGELOW, FLANDRAU & CLARK,
Contra.

(Indorsed:) U. S. circuit court. The Logansport Gas-light Company vs. Alfred H. Knowles & Thomas Harvey. Opinion of court. Filed December 14, 1871, H. E. Mann, clerk.

41 Circuit court of the United States for the district of Minnesota.

THE LOGANSPORT GAS-LIGHT AND COKE Company *ag'st* ALFRED H. KNOWLES AND THOMAS HARVEY.

The defendant Alfred H. Knowles moves the court for a new trial in the above-entitled action, for the following reasons and upon the following grounds, to wit:

1st. That the decision of the court in said action is not justified by the evidence and is contrary to the law.

2nd. Error in law occurring at the trial, and excepted to by the defendant, Alfred H. Knowles.

BIGELOW, FLANDRAU & CLARK,
Att'ys for Def't Knowles.

Let the above motion be noticed for hearing and brought on at the June term of this court for 1872.

R. R. NELSON,
Judge.

(Indorsed:) Circuit court of the U. S., district of Minnesota. The Logansport Gas-light and Coke Company vs. Alfred H. Knowles and Thomas Harvey. Motion for new trial. Filed Dec. 15, 1871, H. E. Mann, cl'k, by W'm A. Spencer, dep. Bigelow, Flandrau & Clark, def'ts' att'ys.

42 United States circuit court, district of Minnesota, October term, 1872.

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY
vs.
ALFRED H. KNOWLES AND THOMAS HARVEY.

NOVEMBER 6, 1871.

This cause being tried before the court without a jury, pursuant to the stipulation of the parties thereto, by their attorneys, on file, and the same having been submitted to the court—

Now, the court being fully advised in the premises, it is by the court considered and adjudged that the plaintiff do have and recover, and from the defendant, Alfred H. Knowles, the sum of eight thousand two hundred and sixty dollars and ten cents, besides the plaintiff's costs and disbursements by it in and about its suit in this behalf expended to be taxed, and that the plaintiff have execution therefor.

Judgment record signed this 8th day of January, A. D. 1872, as and for the 6th day of November, A. D. 1871, by direction of the court.

H. E. MANN,
Clerk.

43 *Bill of exceptions.*

Circuit court of the United States, for the district of Minnesota.

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY
vs.
ALFRED H. KNOWLES AND THOMAS HARVEY.

This action was brought on for trial before this court, Hon. R. R. Nelson presiding, at the October term of said court for the year 1871; and a jury trial having been duly waived by the parties hereto, both plaintiff and defendant, the said action was tried by the court without a jury.

The plaintiff, to sustain the issues on its part, introduced the deposition of Elihu S. Rice, a witness on the part of said plaintiff, who testified, among other things, that the said plaintiff was incorporated under the general laws of the State of Indiana, and that a copy of the articles of association was attached to his deposition. He further testified that the judgment upon which this action is brought had never been paid, except as to the sum of $\$34\frac{41}{100}$, recovered on sale of attached property and applied to the payment of said judgment.

44 The said plaintiff then offered in evidence the copy of articles of association, referred to in the deposition of the witness, Elihu S. Rice, and attached to his deposition. The said articles were in due form under the act of the legislature of the State of Indiana, approved May 20, 1852, entitled "An act for the incorporation of manufacturing and mining companies for mechanical, chemical, and building purposes," found on page 358 of the first volume of the revised statutes of the State of Indiana. The only authentication of said articles of association, however, or the only proof that they had ever been filed or recorded as required by the said statute, was contained in two certificates appended thereto in the words and figures following:

STATE OF INDIANA,
Cass County, ss:

I, Horace M. Bliss, recorder, in and for said county, hereby certify that the foregoing is a true, correct, and complete copy of the articles of association of the Logansport Gas-light and Coke Company, as recorded in Mis. Record, vol. 1, page 365, of the records of said county.

Witness my hand and official seal this 25th day of May, A. D. 1863.

[SEAL] HORACE M. BLISS, *R. C. C.*

45 Per J. W. DRILT, *D'p't.*

STATE OF INDIANA,
Office of Secretary of State.

I, Norman Eddy, secretary of state of the State of Indiana, do hereby certify that I have compared the within and foregoing copy with a certified copy of articles of association of the Logansport Gas-light and Coke Company, filed in the office of secretary of state of the State aforesaid, on the 27th day of May, 1863, as appears from the date of filing endorsed thereon, and that it is a full, true, and complete transcript therefrom and of the whole of said certified copy.

In witness whereof I have hereunto set my hand and affixed the seal of the State, at the city of Indianapolis, this 13th day of November, A. D. 1871.

[SEAL.] NORMAN EDDY,
Secretary of State.

The defendant, Alfred H. Knowles, by his counsel objected to the said articles of association being received in evidence upon the following grounds:

1st. They are incompetent to prove the incorporation of the plaintiff under the laws of Indiana for the following reasons:

The 1st section of the law requires that the articles of incorpo-
46 ration when signed & acknowledged as therein required, shall be filed and recorded with the recorder of the county and "a duplicate thereof," not a certified copy, shall be filed in the office of the secretary of state.

The certificate of the secretary of state says and shows that a certified copy of the articles of association of the plaintiff was filed in his office, and that the paper offered in evidence is a copy of such certified copy so filed. The duplicate required by the statute is a duplicate original, and not a certified copy. So the plaintiff has never been a corporation and cannot maintain this action here, and could not maintain it in Indiana.

Section 2d of the act expressly makes the incorporation of the company depend upon the filing of the certificate in the recorder's office, and the office of the secretary of state, such filing being a condition precedent to the plaintiff becoming a corporation.

2nd. The paper is not properly or sufficiently authenticated to admit it as evidence, in this: It is not a judicial record, or a record appertaining to a court, but a record which falls within the act of Congress of March 27th, 1804, (2 Stats. at Large, 298,) which covers all "rec-
47 ords and exemplifications of office-books which are or may be kept in any public office of any State," and provides how such records shall be authenticated to admit them in evidence in the courts of other States. That the record of the same in the office of the recorder of Cass County must be shown by the attestation of the keeper of the record or book, is in this case satisfied by the certificate of the recorder under

his seal. It should then have a certificate of the presiding judge of the court of the county or district in which said office may be kept, or of the governor, secretary of state, chancellor, or keeper of the great seal of the State, "that the attestation of the recorder is in due form and by the proper officer. No such certificate is appended, and consequently there is no proof that the articles were ever recorded at all, even supposing they had been duly filed in the office of the secretary of state, which we have shown they were not.

The proper certificate in this case would have been that of the presiding justice of the Cass County court, in which case the further certificate of the clerk or prothonotary of the court must be attached to the effect "that the same presiding justice is duly commissioned and qualified."

48 The court overruled the said objections and received the said articles in evidence, to which ruling and decision the counsel for the defendant, Alfred H. Knowles, then and there duly excepted.

The said plaintiff then offered in evidence the record of the judgment upon which this action is brought, which said record is in the words and figures following, that is to say:

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY
vs.
JOHN W. BAIN, ALFRED H. KNOWLES, AND THOMAS HARVEY.

Be it remembered that on the 18th day of September, A. D. 1865, the above-named plaintiff, by Pratt & Baldwin, her attorneys, filed in the office of the clerk of the Cass County circuit court her complaint in the records and figures following, to wit:

Cass circuit court to February term, 1866.

THE STATE OF INDIANA, *Cass County, ss:*

The Logansport Gas-light and Coke Company, plaintiff in this suit, complains of John W. Bain, Alfred H. Knowles, and Thomas Harvey, defendants to this suit, and shows to the court that on the 13th day of September, 1862, the defendants, under the firm-name and style of Thomas Harvey & Co., made and entered into a written contract

49 with the plaintiff, a copy of which, with the subscribers' names attached thereto, is in the words and figures following, and which copy, marked Exhibit A, is filed herewith and made part of this complaint. The said John W. Bain, though one of the subscribers to said contract, was a secret or dormant partner of the said firm of Thomas Harvey & Co. at the time said contract was made.

Pursuant to said article of agreement the said subscribers to the stock of said company did *did*, on or about the 23d day of May, 1863, organize themselves into a company under the provisions of a law of said State, approved May 20, 1852, entitled "An act for the incorporation of manufacturing companies and companies for mechanical, chemical, and building purposes," and the laws of said State amendatory of said act, and made the certificate in writing contemplated in said law, and that said organization had been regularly engaged in the manufacture of gas and coke from coal, and in the furnishing of illuminating gas to such persons as chose to consume the same in the city of Logans-

port, and the plaintiffs aver that said subscribers to said stock have all paid the several sums so subscribed by them, and said company
50 have done and performed all that was required of them by said contract on their part, but the defendants have failed to perform said contract on their part. They have failed to construct on the grounds purchased by them and subsequently conveyed to the plaintiffs, suitable buildings and fixtures, machinery and apparatus of good material and workmanship for the manufacture of gas.

The plaintiffs aver that the second bench of retorts was improperly and imperfectly constructed and set, by reason of which the retorts set therein were burned out and rendered worthless in one-third of the time said retorts would have lasted if properly set, and by reason of this there was a large loss of gas and a great waste of fuel, and by reason thereof the plaintiffs were not able to supply the needful amount of gas to the consumers during the months of October and November, 1864.

The defendants placed meter instead of stop cocks in the service pipe, causing great leakage of gas, making it necessary for the plaintiff to trench and replace them.

The defendants neglected to provide any means of ventilation over the purifier, whereby the tin roof became eaten by the gas and destroyed.

51 The arches and walls were imperfectly and insufficiently constructed, whereby it became necessary to remove the same in the space of 4 months from the time of their construction, whereas if properly constructed should have lasted ten years.

The defendants failed to furnish a stationary meter, which was necessary and proper to the completion of said gas-works.

The bents were not properly put in; they were insufficiently braced, the irons being too light, and the walls of the side too thin.

The defendants failed to supply 70 feet of pipe to convey steam from the boiler to the tank, and seventy feet of pipe to convey water from the canal to the boiler.

The defendants failed to supply good and sufficient stop cocks, whereby a large amount of gas was wasted, and the plaintiff had to substitute others.

By reason of which failings on the part of the defendants to perform their said contract the plaintiffs have sustained damages to the amount of three thousand dollars, which sum is justly due to the plaintiffs from the defendants, and wholly unpaid.

Wherefore the plaintiffs demand judgment against the defendants for three thousand dollars and other proper relief.

PRATT & BALDWIN,
Att'ys for Pl'ffs.

52 And afterwards, to wit, on the 18th day of January, A. D. 1866, said plaintiffs, by said Pratt & Baldwin, their attorneys, filed in the office of the clerk of the Cass circuit court the following amended complaint herein in these words, to wit:

Cass circuit court—to February term, 1866.

THE STATE OF INDIANA, *Cass County:*

The Logansport Gas-light and Coke Company, plaintiffs in this suit, complain of John W. Bain, Alfred H. Knowles, and Thomas Harvey, defendants to this suit, and show to the court by this amended com-

plaint, which is filed in the place of their original complaint, filed in this court on September 10, 1865, the following as their cause of action, to wit:

On the 13th day of September, 1862, the said defendants, under the name, firm, and style of Thomas Harvey & Co., made and entered into a written contract, a copy of which, with the names of the subscribers thereto, is filed herewith and made part of this complaint, marked Exhibit A, and is in the words and figures following:

"EXHIBIT A.

"Articles of agreement made this 13th day of September, 1862, between Thomas Harvey and Alfred H. Knowles, of the firm of T. Har-
53 vey & Co., of Marion, Ohio, of the first part, and the parties whose names are hereto subscribed, of the second part, witnesseth:

"That the first party, T. Harvey & Co., on their part, agree to furnish gas, as is usually manufactured for lights in the cities of this State and Ohio, from coal. To furnish convenient grounds and construct thereon suitable buildings and fixtures, machinery, and apparatus of good material and workmanship, for the manufacture of said gas, and of sufficient capacity to manufacture and supply gas for four hundred consumers; to furnish and lay down six thousand feet of main pipe of cast iron of proper size and proportions, and wrought-iron service pipes to the line of the lot required for one hundred consumers; and if consumers more than this number can be obtained before Oct. 1, '63, then for the additional number also; to furnish "all street-boxes, stop-cocks to said consumers, on the outer line of the streets of the city of Logansport, Indiana. The foundations of the retort and purifying building to be of stone, and the walls of the same to be stone or brick; the roof of the retort-house to be of slate, and supported on iron frames. The
54 lime and coal house to be constructed of wood. To construct two benches of retorts with two retorts in each bench, with all necessary apparatus, to be furnished with four purifiers and all necessary fixtures and apparatus. The gas'meter to be 30 feet in diameter by 12 feet deep, with all necessary fixtures for counter-balance, &c. The tank to be built of good hard-burnt brick or stone, laid up in cement, thirty-three feet in diameter and twelve feet deep, and seventy-five meters. The whole to be furnished and completed on or before October 1, 1863.

"And said party of the first part is to purchase said grounds and construct said works, fixtures, and apparatus, and warrant their proper and successful operation at their own proper cost and charge, and take the title therefor in their own name in trust for the Logansport Gas-light and Coke Company, and under the ordinance passed by the common council of Logansport, Ind., August 21, 1862, and other proceedings necessary to keep good said ordinance for benefit of the subscribers hereto they authorize the first party to do. Said T. Harvey & Co. at the completion of said work shall convey to said stockholders all
55 said real estate and fixtures of every kind in such form of deed as the stockholders hereto subscribed shall by a vote of a majority of the stock determine.

"And the parties of the second part whose names are hereto subscribed, in consideration of the premises, do severally agree and promise to pay to the first party the sums of money set opposite their respective names in installments as follows:

"10 per c't. November 1, '62.
"20 " " Jan'y 1, '63.
"20 " " March 1, '63.
"20 " " April 1, '63.
"30 " " at the completion of the works.

"And it is mutually agreed between the parties hereto, that they shall and do hereby constitute themselves into a joint-stock company, under the name of the Logansport Gas-light & Coke Company. That the capital stock shall be at the option of said first party to go on with the work or not on the capital stock which may be subscribed, retaining the balance themselves; and when the parties of the second part shall have paid the amounts they respectively subscribed hereto, as shall be shown by receipt and vouchers signed by T. Harvey & Co., they shall be joint owners of said gas-works, building, structure, pipes, fix-
56 tures, &c. &c., in proportion to the amounts of their respective subscription.

"It is further agreed between the parties that at completion of the works, if the second party hereto shall by a majority of the stock require the first party to rent said works and all fixtures pertaining thereto for the sum of twenty-five hundred dollars for one year from the date of said completion, then the first party shall so do.

"It is further agreed, however, that in event of this lease, the first party shall have the refusal of the said works, &c., &c., for the two years following said lease at the same rate per year, viz, $2,500.

"THOMAS HARVEY & CO.

"*Subscribers' names.*

	$ Cts.
J. W. Bain	10,000 00
J. A. Taylor	1,000 00
Merriam, Rice & Howes	1,000 00
Richard Green	1,000 00
E. T. Stevens	600 00
Theo. C. Mitchell	200 00
W'm M. Kreider	300 00
J. L. Baldwin	100 00
Theo. C. Mitchell	200 00
I. S. Miller	100 00
T. H. Wilson	1,000 00
Allen Richardson	500 00
H. Ball, jr	250 00
57 James S. Wilson	100 00
J. B. Shultz	100 00
J. B. Shultz	150 00
W. T. S. Manley	100 00
Horace P. Biddle	500 00
M. A. Manlone	200 00
Tangney & Barnhizel	100 00
Henry H. Barnhizel	100 00
John Brown	200 00
James A. Rodgers	100 00
T. H. Bringhurst	200 00
C. S. Vigors	100 00
John C. Merriam	50 00
Martin McHale	50 00

J. W. Fuller	50 00
G. N. Fitch	1,000 00
D. D. Pratt	500 00
J. W. Bain, (real estate)	1,000 00
G. N. Fitch	250 00
T. H. Wilson	250 00
S. C. Taber	250 00
J. L. Baldwin	50 00
D. D. Pratt	500 00
Jas. S. Wilson	400 00
T. P. McCrea	500 00
Merriam, Rice & Howes	500 00
J. B. Shultz	150 00
Tangney & Barnhizel	200 00
J. W. Bain	1,750 00

58 "The following subscriptions draw 10% annually, commencing from date of their several payments to Harvey & Co., that is, in case the works are rented to said Harvey & Co., at that rate, but if the stockholders elect to run them themselves, then the subscribers hereto shall fare as do the original stockholders as to dividends and in all other matters and respects.

G. N. Fitch	$1,000 00
T. H. Wilson	750 00
Thomas Harvey & Co	500 00
G. N. Fitch, by J. C. M	500 00
J. W. Bain	1,250 00

"The said defendant Bain was one of the subscribers to said original and also to the supplemental contract set out in said exhibit. Said Bain was also at the same time a secret partner of Thomas Harvey & Co., but that fact was unknown to the other subscribers of said contract."

Pursuant to said written contract & articles of agreement, the stockholders to the same did, on or about the 23d day of May, 1863, organize themselves into a company under the provisions of a law of said State, approved May 20, 1852, entitled "An act for the incorporation of manufacturing and mining companies, and companies for mechanical
59 and building purposes," and the laws of said State amendatory of said act, and made the certificate in writing contemplated in said law, adopting as their name The Logansport Gas-light and Coke Company, and said organization formed pursuant to said written agreement and contract, the said subscribers who made said contract with Thomas Harvey & Co. have been regularly engaged since so becoming a corporation in the manufacture of gas and coke from coal, and in supplying illuminating gas to consumers within the city of Logansport, where the plaintiff's works are situated.

And the plaintiffs aver that said subscribers to the stock of said company have all paid the said several sums so subscribed by them, with the exception of the said defendants, who have not, any of them, paid any sum whatever of the sums so subscribed by the defendant, Bain, and by the firm of T. Harvey & Co., which latter firm was composed, as above stated, of said defendant.

And the plaintiffs further aver that all of the subscribers to said contract except the defendants were citizens of said county of Cass, residing in Logansport, and had no practical knowledge of the manufac-

ture of gas or of the cost of the necessary works and machinery
60 to manufacture and supply gas, or of the number and size of retorts necessary to supply 400 consumers, or of the proper size of the gasometer to contain the necessary quantity of gas to supply that number of consumers, or of the mode in which the benches for the retorts should be constructed, or of the size of the pipes proper to conduct the gas from the gas-works to the different parts of the city, and relied for information upon all and singular these matters upon the said defendants. The said Bain represented himself as the friend of the said Harvey and Knowles; as their creditor; as having been concerned with them in the construction and operation of gas-works in Marion, Ohio, and was anxious to aid them in business, and professing to have the greatest confidence in the profitableness of gas-works in the city of Logansport, proposed to take ten thousand dollars of stock in the company himself. The said Bain wrote said contract, and was the canvasser to obtain the other subscriptions, all the time purposely, and with the view of deceiving and defrauding the other subscribers, studiously and deceitfully concealing his own relation as a partner with the said Knowles and Harvey in said contract.

The defendants had been engaged in the business of building
61 gas-works and the manufacturers of gas, and well knew how proper gas-works should be built, and the cost of the same, and well knew that the other subscribers were ignorant upon these matters and relied wholly upon their representations.

Thus it was that the defendants caused the said other subscribers to believe that it was worth the sum of twenty-five thousand dollars to do and perform all and singular the things which the said firm of Thomas Harvey & Co. agreed to do by said contract; and thus it was that the defendants caused the subscribers to believe that two benches of retorts with two retorts in each bench were sufficient to manufacture gas to supply 400 consumers; and thus it was that the said defendants caused the subscribers to believe that a gasometer of 30 feet in diameter by 12 feet depth was of sufficient capacity to supply that number of consumers with gas, and that a tank of 33 feet in diameter and twelve feet deep was of proper capacity; whereas, in truth and in fact, the plaintiffs aver that the proper cost of such gas-works as the defendants thus agreed to construct, with all fixtures, apparatus, and land, and including all that defendants agreed in and by said contract to
62 perform was not more than the sum of two thousand dollars; and whereas, in truth and in fact, three benches of retorts with three retorts in each bench were necessary to manufacture gas to supply 400 consumers; and whereas, in truth and in fact, a gasometer of forty feet in diameter and 18 feet in depth was necessary.

And the plaintiffs aver that the said Bain purchased and procured the title to be made to himself the ground upon which said gas-works are situated, and afterwards conveyed said ground to said company; but the plaintiffs aver that said ground was insufficient in quantity, and the plaintiffs aver that the said defendants have failed to comply with their said contract in the following particulars, to wit:

The buildings constructed by said defendants are not suitable, they are too small in size and were unskillfully and insufficiently constructed; they are not of sufficient capacity to manufacture and supply gas for four hundred consumers.

The defendants failed to furnish and lay down six thousand feet of main pipe of cast iron of proper size and proportion. The defendants wholly failed to provide and furnish a station meter, which was a

63. proper and necessary fixture of said gas-works, demanded by said contract, and the cost of which, and setting the same, is the sum of five hundred dollars.

The defendants caused the main pipes to be laid with faulty and imperfect joints, whereby the gas passing through the same largely escaped.

The main pipes were also defective, whereby gas escaped. The main pipes were not laid sufficiently deep, but laid near the surface of the ground and within the reach of frost. The hydraulic main is not suitable and should be more substantial; it should be put together with wrought-iron bolts, 8 or 10 in number, the entry of the hydraulic having flanges for that purpose, whereas the defendant made the joint without cement, in consequence of which they are continually leaking.

The purifying-boxes in said gas-works are imperfect, two of them in this, that the inlet comes from the top, causing the gas to be passed down through the lime, whereas the same should come from the bottom, that the gas might flow of itself to the top and thence to the gasometer without loss.

64 The condensers in said gas-works are too small, making them liable to stop up with tar. They should have been larger by at least two inches.

The lime-trays in the purifying-boxes are made of wood and are apt to swell, closing the open spaces made for the gas to pass through the lime and had to be removed from the boxes; said trays should have been made of iron.

There should have been three benches of retorts with three retorts in each bench, instead of two benches and four retorts. The retort benches built by the defendants were weakly built and imperfectly constructed, the outside wall being but eight inches thick when it should have been sixteen inches. The upright iron braces and bars were not of sufficient strength or fastened at the ends with nuts as they should have been; the arches were unskillfully built and gave way after the use of four months, whereas they should have lasted ten years if properly built; and in consequence of this imperfection the said company lost two retorts of the value of $800, and consumed a large quantity of coal unnecessarily; and said company were not able to supply their customers with gas, and were obliged to put in new retorts and new benches at a cost of one thousand dollars.

65 Said works are not large enough to supply more than 200 consumers; the gasometer and tank are too small for that purpose. The retort-house is too small by six feet in width and ten feet in length. The drips should have been iron cast boxes holding at least 10 gallons of water, and not less than six of said boxes should have been used in the pipe laid by said defendants. The drips now consist of $\frac{3}{4}$-inch pipe. In consequence of this defect the company have lost much gas and been put to great expense and the gas-works are liable to explosion.

The defendants placed meter instead of stop cocks in the service-pipe, in consequence of which there is and has been great leakage of gas, and it is necessary for the plaintiff to trench and replace them.

The defendants neglected to provide any means of ventilation over the purifier, whereby the roof became eaten by the gas and destroyed, and said company were obliged to substitute a new roof at a cost of $100.

66 The defendants failed to supply 70 feet of pipe to convey steam from the boiler to the tank, and 70 feet of pipe to convey water from the canal to the boiler, which pipes necessarily supplied cost the sum of two hundred dollars.

The defendants failed to supply good and sufficient service-cocks, substituting meter-cocks, whereby a great amount of gas was wasted and the company sustained much loss. Said defendants did not observe and keep their warranty as to the successful operation of said works, fixtures, and apparatus. The same could not be operated successfully by reason of the defects, imperfections, and shortcomings aforesaid. And the plaintiffs aver that said company and said subscribers to said contract (except the defendants) have done and performed all that was required of them in and by said contract. And the plaintiffs aver that by reason of the frauds, misrepresentations, concealments, and grievances aforesaid, and the failure of the defendants to perform their said contract, the plaintiffs have sustained damages to the amount of ten thousand dollars, which sum is justly due to the plaintiffs from the defendants, and remains wholly unpaid. Wherefore the plaintiffs demand judgment against the defendants for the sum of ten thousand dollars and other proper relief.

PRATT & BALDWIN,
67 *Att'ys for Pl'ffs.*

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY
vs.
JOHN W. BAIN, ALFRED H. KNOWLES, AND THOMAS HARVEY.

Civil action in the Cass circuit court.

We undertake that the plaintiffs shall duly prosecute their proceeding in attachment in this action, and pay to the defendants and every of them all damages which they, or any of them, may sustain if the proceedings of the plaintiffs shall be wrongful and oppressive.

Witness the common seal of the company and its president's signature.

January 18, 1866.

THOMAS H. WILSON,
Surety.

The Logansport Gas-light & Coke Company, principal—
By THOMAS H. WILSON,
Its President.

And afterwards, to wit, at a term of the Cass circuit court, begun and held at the court-house in the city of Logansport, commencing on the 4th Monday, being the 26th day of February, A. D. 1866, before honorable Horace F. Biddle, judge of said court, the following proceedings had in said court on the 13th judicial day thereof, being the 12th day of
68 March, A. D. 1866, before honorable Robert C. Gregory, one of the judges of the supreme court of the State of Indiana, judge of said court, were entered of record on the order-book No. J, page 465, of said court, in these words, to wit:

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY, compl't,
vs.
JOHN W. BAIN, ALFRED H. KNOWLES, & Thomas Harvey, principals; Elihu S. Rice, Allen Richardson, Henry Ball, jr., William Jones, Louisa Williams, Munroe Williams, and Charles B. Knowlton, garnishees.

Comes now said Logansport Gas-light and Coke Company, by Pratt

& Baldwin, their attorneys, and now file the summons issued in this cause, showing that the same was read to the said defendant, John W. Bain, and a copy thereof delivered to him in the city, county, and State of New York, more than ten days before the first day of the present term of this court, and which is verified by the affidavit of one William H. Weeks, sworn to before a notary public of said city, county, and State, and which writ of summons and affidavit are in these words, to wit:

69 The State of Indiana to the sheriff of Cass County:

You are hereby commanded to summon John W. Bain, Alfred H. Knowles, and Thomas Harvey to appear in the Cass circuit court on the second day of the next term thereof, to be held at the court-house in Logansport, on the fourth Monday in February, 1866, then and there to answer the complaint of the Logansport Gas-light and Coke Company. Amount demanded, ten thousand ($10,000) dollars. And of this summons make due return.

Witness the clerk and seal of said court this 18th day of January, A. D. 1866.

[L. S.] HORACE M. BLISS,
Clerk.

THE STATE OF NEW YORK,
County and City of New York:

Be it remembered that on this day personally came before me the undersigned, a notary public, of said city, county and State, dwelling within said city, William H. Weeks, of lawful age, who, being by me duly sworn, upon his oath deposes and swears, that he did at this day, at No. 9 in Platt street in said city of New York, serve the writ of summons hereto attached, issued by the clerk of the Cass circuit in
70 the State of Indiana, on the 18th day of January, 1866, in a certain action pending in said court, wherein the Logansport Gas-light and Coke Company are plaintiffs, and John W. Bain, Alfred H. Knowles, and Thomas Harvey are defendants, on the said defendant, John W. Bain, by reading said writ of summons, and showing the same to him and at the same time delivering him a true copy thereof, and that the person thus served with said notice is the identical person named in said action; and he further swears that the deponent is of lawful age and in no wise related to any of the parties to said action, and has no interest in said action; and further deponent saith not.

W'M H. WEEKS.

Subscribed and sworn to before me, a notary public as above, on *the* this 23d day of January, 1866, as witness my hand and notarial seal.

[L. S.] JOHN S. PATTERSON,
Notary Public City and County of New York.

Fee for same, $1.50; notary fees, 50—$2.00.

And afterwards, to wit, on the 16th judicial day of said term, being the 15th day of March, A. D. 1866, before Robert C. Gregory, judge as aforesaid, the following proceedings were had and entered of record on the order-book No. J, page 477, of said court, in these words, to wit:

71 THE LOGANSPORT GAS-LIGHT AND COKE Company, compl't and garnisher,
vs.
JOHN W. BAIN, ALFRED H. KNOWLES, AND Thomas Harvey, principals, Elihu S. Rice, Allen Richardson, Harvey Ball, jr., William Jones, Louisa Williams, Marion Williams, and Charles B. Knowlton, garnishees.

Come now the plaintiffs, by Pratt & Baldwin, their attorneys, but the defendants, Thomas Harvey and Alfred H. Knowles, though each three times called, come not, but herein wholly make default, and the plaintiffs now show to the court by the return of the sheriff of Cass County, upon the writ of summons issued in their behalf, that said Harvey and Knowles were duly served with process to appear to this action more than ten days before the first day of the present term of this court, which writ and the return of the sheriff endorsed thereon are in these words, to wit:

The State of Indiana to the sheriff of Cass County:

You are hereby commanded to summon John W. Bain, Alfred H. Knowles, and Thomas Harvey, to appear in the Cass circuit court on the second day of the next term thereof, to be held at the court-
72 house in Logansport on the fourth Monday in February, 1866, then and there to answer the complaint of Logansport Gas-light and Coke Company; amount demanded three thousand ($3,000) dollars. And of this summons make due return.

Witness the clerk and seal of said court this 18th day of September, A. D. 1865.

[L. S.] HORACE M. BLISS,
Clerk.

I do hereby certify that I served the within writ on the 19th day of September, 1865, upon Alfred H. Knowles and Thomas Harvey, personally, by reading the same to them, and I further certify that John W. Bain cannot be found in my bailiwick.

JOHN DAVIS,
Sheriff Cass County.
By JAMES STANLEY,
Deputy.

And said defendants still failing to appear to said action, it is considered by the court that said complaint be taken as true against them, and the said defendant, John W. Bain, now comes by D. D. Dykman, esq'r, his attorney, and the said Bain now files his written motion in this court to dismiss said writ of attachment in these words, to wit:

THE LOGANSPORT GAS-LIGHT AND COKE COMpany
vs.
73 JOHN W. BAIN AND OTHERS.

Cass circuit court, Feb'y term, 1866.

The defendant, John W. Bain, who appears duly, specially for the purpose, comes and moves the court—

1st. To dismiss the proceedings in attachment on account—
1st. Of no sufficient affidavit.
2d. " " bond.
3d. " " writ.
2d. Defendant Bain also moves the court to dismiss this action as to him, because no cause of action is shown against him in the complaint.

DYKEMAN & McCONNELL,
Att'ys for Bain.

Which motion is overruled by the court, to which decision of the court the said Bain excepts, and the said Bain now files his demurrer to said complaint in these words:

Cass circuit court, Feb'y term, 1866.

THE LOGANSPORT GAS-LIGHT & COKE CO.
vs.
JOHN W. BAIN ET AL.

The defendant, John W. Bain, who has been served out of the State and only by constructive notice, and who, without entering such an appearance against him as will authorize any personal judgment
74 against him, but simply to controvert the right of the plaintiff's attachment, comes and demurs to the plaintiff's complaint in this behalf for the reason that the same does not state facts sufficient to constitute a cause of action against him.

McCONNELL & DYKEMAN,
Att'ys for Bain.

Which demurrer the court overruled, to which decision the said Bain excepts, and the said Bain now files his answer of five paragraphs, in these words:

THE LOGANSPORT GAS-LIGHT & COKE CO.
vs.
JOHN W. BAIN.

The defendant, who is a non-resident of the State of Indiana, and not served personally with process and having only constructive notice, comes, and for the purpose of avoiding any attachment against his property and avoiding any judgment against the same, and does not enter his appearance to this action so as to allow a personal judgment against him, but appearing only in this manner, comes and answers as follows:
1st. He denies each and every allegation made in the plaintiff's complaint and affidavit for attachment, and in the attachment proceed-
75 ings.
2d. The defendant further says that the plaintiff has, before the bringing of this action, released and discharged the defendant from all claims or right to damages on account of the matters charged in the complaint.
3d. The defendant says that, before the bringing of this suit, or after, by amicable agreement between the plaintiff and defendant—but the defendant is not able to furnish the paper, document, or writing, for the reason that the same is not in his possession or under his control; and for that reason he is not able to furnish a copy of the same—fully discharged and released said other defendants from all claims for damages growing out of the matters charged in the plaintiff's complaint. Wherefore he charges that by reason that the same having been executed

without his knowledge or consent, he claims to be also released therefrom.

4th. The defendant, further answering said complaint, says that the facts charged in the complaint were all known to the plaintiff when she took the works and buildings, gas-fixtures, &c., off of the hands of Thomas Harvey and Knowles; that the same were in use for two years by the plaintiffs, on trial; and the plaintiffs, with such knowledge and trial, were abundantly satisfied with said works, and received
76 them from the hands of Harvey & Knowles.

5th. He denies being a partner of Harvey & Knowles, or having any interest whatever in the profits of the construction of said works.

McCONNELL & DYCKMAN,
For Def't Bain.

The plaintiffs move the court to reject the 5th paragraph of the answer, which motion is sustained, the said Bain excepting at the time; and the plaintiffs now file their separate demurrers to the third and fourth paragraphs of the answer.

THE LOGANSPORT GAS-LIGHT & COKE CO.
vs.
JOHN W. BAIN AND OTHERS.

The plaintiffs demur to the third paragraph of the answer of John W. Bain, and for cause of demurrer say that the same does not state facts sufficient to constitute a defence to said action.

PRATT & BALDWIN,
Att'ys for Pl'ff.

The plaintiffs also demur to the fourth paragraph of the answer of John W. Bain, and say that the same does not state facts sufficient to constitute a defence to said action.

PRATT & BALDWIN,
Att'ys for Pl'ff.

The court overrule' the demurrer to the third paragraph of the
77 answer, to which decision the plaintiffs excepted, and the court sustain the demurrer to the fourth paragraph of the answer, to which decision the defendant Bain excepted; and the defendant Bain has leave to amend said 4th paragraph; and this cause is continued, with leave to the plaintiffs to amend this complaint.

And afterwards, to wit, at a term of the Cass circuit court begun and held at the court house in the city of Logansport, in the county of Cass, and State of Indiana, commencing on the 4th Monday, being the 27th day of August, A. D. 1866, before honorable Horace P. Biddle, judge of said court, the following proceedings, had in said court on the 17th day of September, A. D. 1866, before the judge aforesaid, were entered of record on the order-book No. I, page 578, of said court, in these words, to wit:

THE L. G. L. & COKE CO.
vs.
JOHN W. BAIN ET AL.
Attachment.

Continued.

And afterwards, to wit, at a term of the Cass circuit court begun and held at the court-house in the city of Logansport, in the county of Cass,

and State of Indiana, commencing on the 4th Monday, being the 25th day of February, A. D. 1867, before honorable Horace P. Biddle,
78 judge of said court, the following proceedings, had in said court on the 24th judicial day of said term, being the 25th day of March, A. D. 1867, before the judge aforesaid, now entered of record in the order-book K, page 175, of said court, in these words, to wit:

THE LOGANSPORT GAS-LIGHT AND COKE COMpany, comp't, *vs.* JOHN M. BAIN ET AL. } Attachment and garnishee.

On motion, this cause is continued.

And afterwards, to wit, at a term of the Cass circuit court begun and held at the court-house in the city of Logansport, in the county of Cass, and State of Indiana, commencing on the 4th Monday, being the 25th day of August, A. D. 1867, before honorable Horace P. Biddle, judge of said court, the following proceedings had in said court, before the judge aforesaid, on the 8th judicial day of said term, to wit, on the 3d day of September, A. D. 1867, were entered of record in the order-book K, page 325, of said court, in these words, to wit:

THE LOGANSPORT GAS-LIGHT AND COKE COMpany, compl't, &c., *vs.* JOHN M. BAIN ET AL.

On motion, continued.

And afterwards, to wit, at a term of the Cass circuit court be-
79 gun and held at the court-house in the city of Logansport, Cass County, Indiana, commencing on the 4th Monday, being the 24th day of August, A. D. 1868, before the honorable Horace P. Biddle, judge of said court, the following proceedings, had on the 6th judicial day of said term, to wit, on the 2d day of March, A. D. 1868, were entered of record in the order-book L, page 86, of said court, in these words, to wit:

THE LOGANSPORT GAS-LIGHT AND COKE COMpany, compl't, *vs.* JOHN M. BAIN. } Attach., &c.

Continued by agreement.

And afterwards, to wit, at a term of the Cass circuit court begun and held in the court-house in the city of Logansport, in the county of Cass, and State of Indiana, commencing on the 4th Monday, being the 22d day of February, A. D. 1869, before honorable Horace P. Biddle, judge of said court, the following proceedings had in said court, before the judge aforesaid, on the 19th judicial day of said term, to wit, on the 19th day of March A. D. 1869, were entered of record in the order-book M, page 40, of said court, in these words, to wit:

LOGANSPORT GAS-LIGHT & CO. *vs.* JOHN W. BAIN ET AL.

80 Continued.

And afterwards, to wit, at a term of the Cass circuit court begun and held at the court-house, in the city of Logansport, in the county of Cass, and State of Indiana, commencing on the 2d Monday, being the 8th day, of November, A. D. 1869, before honorable Horace P. Biddle, judge of said court, the following proceedings had in said court, before honorable William Z. Stuart, judge pro tem., on the 33d judicial day of said term, to wit, on the 15th day of December, A. D. 1869, were entered of record in the order-book M, page 453, of said court, in these words, to wit:

THE LOGANSPORT GAS-LIGHT & COKE COMpany, compl't,
vs.
JOHN W. BAIN ET AL.

Come now the parties by their attorneys, and on motion of the defendants the depositions of James R. Floyd, Joseph A. Sabbanten, Ambrose J. White, Lewis Crups, Jacob Riblet, Joseph Levy, jr., John E. Daily, Frederick Maine, Edward Griep, Andrew W. Stevens, Alfred H. Knowles, J. M. Stanley, J. A. Sheppard, John B. Garrett, Thomas G. Hepper, and John Frey, on file in this cause, are published; and the
81 defendant, John M. Bain, for himself and the other defendants, now files affidavits in these words:

Cass circuit court, February term, 1869.

THE STATE OF INDIANA,
County of Cass:
THE LOGANSPORT GAS-LIGHT AND COKE COMpany
vs.
JOHN W. BAIN, ALFRED H. KNOWLES, AND Thomas Harvey et al.

Affidavit of John W. Bain, defendant, for a change of venue from said Cass circuit court to the United States circuit court in the district of Indiana:

Comes now John W. Bain, one of the defendants herein, and on his solemn oath says that he is now, and has been for two years, a citizen of the State of New York, being then and there a resident of the city of New York in said State. That said defendants, Knowles and Harvey, are citizens of the State of Minnesota, and have been, more than a year past. That the matter in dispute between the parties herein exceeds the sum of five hundred dollars, exclusive of costs. That by reason of prejudice and local influence in favor of the plaintiff and against each and all of the defendants, neither this affiant nor either of said defendants, he has reason to believe and does believe, will be able to obtain justice in the aforesaid Cass circuit court.

Whereupon the said John W. Bain, defendant herein, for him-
82 self and for the other defendants, to wit, Alfred H. Knowles and Thomas Harvey, respectfully moves the court in this behalf that this cause may be removed to the United States district court within and for the district of Indiana.

JOHN W. BAIN.

THE STATE OF MARYLAND & CITY OF BALTIMORE,
County of Baltimore:

On this 14th day of April, 1869, before me, Joseph I. Atkinson, a notary public within and for said city, county, and State, personally came John W. Bain, and made oath in due form of law that the foregoing affidavit for a change of venue of the cause in which the Logansport Gas-light and Coke Company vs. John W. Bain, Alfred H. Knowles, & Thomas Harvey et al., to be filed in the Cass circuit court within and for the county of Cass, and State, to which his name subscribed is true in substance and in fact.

JOHN W. BAIN.

Subscribed and sworn to before me this 14th day of April, A. D. 1869. Witness my hand and notarial seal.

[L. S.] JOSEPH I. ATKINSON,
Notary Public.

83 And moves the court to transfer this cause to the circuit court of the United States for the district of Indiana. And said defendants now file bond with Stewart T. McConnell as surety therein in these words:

THE STATE OF INDIANA,
County of Cass, ss:

Cass circuit court, November term, 1869.

THE LOGANSPORT GAS-LIGHT & COKE COMPANY
vs.
JOHN W. BAIN, THOMAS HARVEY & ALFRED H. KNOWLES et al.

Undertaking to transmit copies of all papers, &c.

We, John W. Bain and Stewart T. McConnell, hereby undertake and bind ourselves to enter in the circuit court of the United States for the district of Indiana, on or before the first day of the next term thereof, copies of all process, pleadings, depositions, testimony, and other proceedings in said above-entitled suit, to do any and all other acts as are required by law to be done upon the removal of a suit into the United States circuit court from a State court.

Dated at Logansport, Indiana, this 15th day of December, 1869.

JOHN W. BAIN, [SEAL.]
Pr McCONNELL & WINFIELD,
His Atty's in fact.
STEWART T. McCONNELL. [SEAL.]

84 Which is approved by the court, and it is ordered by the court that this cause be transferred to the circuit court of the United States for the district of Indiana for trial in accordance with the prayer of the petitioner herein.

And afterwards, to wit, at a term of the Cass circuit court begun and held at the court-house in the city of Logansport, in the county of Cass, and State of Indiana, commencing on the 2d Monday, being the 14th

day of November, A. D. 1870, before honorable Horace P. Biddle, judge of said court, the following proceedings, had in said court before honorable Thomas S. Stanfield, judge pro tem. of said court, on the 25th judicial day of said term, to wit, on the 13th day of December, A. D. 1870, was entered of record on order-book "N," page 426, of said court, in these words, to wit:

THE LOGANSPORT GAS-LIGHT AND COKE COMPANY
vs.
JOHN W. BAIN, ALFRED H. KNOWLES, & THOMAS HARVEY. } Complaint.

Come now the parties herein and file the following order of the United States circuit court remanding this case to this court, and showing a finding in said court in favor of John W. Bain.

85 And the plaintiff doth now produce the summons herein, dated September 18, 1865, showing personal service thereof on Albert H. Knowles, to wit:

The State of Indiana to the sheriff of Cass County:

You are hereby commanded to summon John W. Bain, Alfred H. Knowles, and Thomas Harvey, to appear in the Cass circuit court on the second day of the next term thereof, to be held at the court-house in Logansport on the fourth Monday in February, 1866, then and there to answer the complaint of Logansport Gas-light and Coke Company. Amount demanded three thousand ($3,000) dollars. And of this summons make due return.

Witness the clerk and seal of said court this 18th day of September, A. D. 1865.

[L. S.] HORACE M. BLISS, *Clerk.*

(Endorsed:)

I do hereby certify that I served the within writ on the 14th day of September, 1865, upon Alfred H. Knowles and Thomas Harvey, personally, by reading the same to them. And I further certify that John M. Bain cannot be found in my bailiwick.

JOHN DAVIS,
Sheriff Cass County.
By JAMES STANLY, *Dep'ty.*

(S. M. & Ret. $1.60.)

86 And the said Alfred H. Knowles and the said Thomas Harvey being called three times come not, but herein wholly make default, and the court doth now hear the plaintiff's proofs and allegations herein, and doth find that the defendants, Alfred H. Knowles and Thomas Harvey, are indebted to the plaintiff in the sum of seven thousand eight hundred and fifty dollars, ($7,850.) That plaintiff's attachment, affidavit, and attachment proceedings herein, heretofore had, were and are regular and true. That the attachment herein was duly issued and levied, and the property of said defendants, Thomas Harvey and Alfred H. Knowles, were at the time said attachment was levied liable to the lien thereof. It is therefore considered that the plaintiff, The Logansport Gas-light and Coke Company, do have and recover of and from the defendants, Alfred H. Knowles and Thomas Harvey, the sum of seven thousand eight hundred and fifty dollars ($7,850) and their costs herein paid, laid out, and expended, and have execution therefor. It is further ordered that

the property heretofore attached, to wit, 1 camera box, 1 Mowry photograph-press, 1 camera stand, 4 back-ground frames, 1 small iron head-rest, 1 camera tube, 1 camera stand-mats and preservers,
87 one oil-carpet, window-blinds, imported carpet, stationery, and sundries, printing-frames, 1½ size camera tube, be and the same is hereby ordered to be sold, and all the right, title, and interest of the defendants, Alfred H. Knowles and Thomas Harvey, therein, and the proceeds applied to the payment of the foregoing judgment. And it is further ordered that should said attached property fail to bring a sufficient sum to fully pay said judgment, interest and costs, together with all accruing interests and costs, the residue so remaining unpaid shall be levied of any other property of the defendants, Alfred H. Knowles and Thomas Harvey, subject to execution.

And comes now David L. Fisher and files his complaint herein against Thomas Harvey, and also his attachment bond and affidavit herein in these words:

STATE OF INDIANA,
Cass County, ss:

David L. Fisher, being sworn, says that Thomas Harvey is indebted to him in the sum of $391.13 for money paid for his use and benefit to discharge a note jointly signed by affiant and said Harvey, dated May 5th, '65, for $500 & interest, payable to Asa Gibson. This affiant
88 paid said note May 10, '66, upon Gibson's requisition, paying therefor $530, which amount, together with interest thereupon from May 10, '66, said Harvey owes him, less the following credits, to wit: Nov. 14, '66, $100; April 13, '67, $50; Nov. 9, '67, $15, which credits Harvey is entitled upon said defendants; that plaintiff ought to recover of said Harvey the sum of $391.13, which debt is just; that Thomas Harvey is a non-resident of the State of Indiana; that said Harvey has no property within this State that can be reached by attachment; that Charles B. Knowlton is indebted to said Harvey in the sum of $200, or $250 as affiant verily believes, which sum should be applied on plaintiff's demand; wherefore a writ of garnishment should issue against said C. B. Knowlton. And further says not.

DAVID L. FISHER.

Sworn and subscribed before me this 27th July, 1868.

[L. S.] DANIEL P. BALDWIN,
Notary Public.

STATE OF INDIANA,
Cass County, ss:

We, David L. Fisher & W m H. Standley, undertake to and with the def'ts herein that the pl'ff, David L. Fisher, will duly prosecute this his proceedings in attachment, and will pay all damages which
89 may be sustained in the premises by the defendants, Thomas Harvey and Charles B. Knowlton, if said Fisher's proceedings herein shall be wrongful or oppressive.

Witness our hands and seals this 27th July, 1865.

DAVID L. FISHER. [SEAL.]
W'M H. STANDLEY. [SEAL.]

Against the defendant, Thomas Harvey, and files under the attachment suit in this case of the Logansport Gas-light and Coke Company against Thomas Harvey and Alfred H. Knowles, and the plaintiff do now submit his proofs herein, and the court doth find the allegations of

the complaint herein are true, and that Thomas Harvey is and was at the commencement of this suit indebted to the plaintiff, D. L. Fisher, in the sum of two hundred and ninety dollars, ($290.) No personal service having been had, the court doth find that plaintiff's attachment, affidavit and proceedings herein are regular and true, and that the plaintiff is entitled to share in the proceeds pro rata with the Logansport Gas-light and Coke Company in the proceeds of the attached property.

It is therefore ordered that after the property so attached is
90 sold the plaintiff do have and recover a pro-rata share thereof, and the same is ordered to be applied first to the payment of the costs of this suit, and balance to be paid to the plaintiff upon his demand herein as above determined. No personal judgment is rendered against the defendant.

THE STATE OF INDIANA,
Cass County, ss :

I, Horace M. Bliss, clerk of the Cass circuit court, do hereby certify that the above and foregoing contain a full, true, and complete copy of the papers and proceedings in said cause as the same appear of record and the files thereof in the clerk's office of said court.

Witness the clerk and seal of said court at Logansport, the 11th day of February, A. D. 1871.

[SEAL.]

HORACE M. BLISS,
Clerk Cass Circuit Court.

THE STATE OF INDIANA,
County of Cass, ss :

I, Horace P. Biddle, president judge of the Cass circuit court of the 11th judicial district, within and for the State of Indiana, a court of general common-law jurisdiction, do hereby certify that at the date of the foregoing certificate by him signed, to wit, on the 11th day
91 of February, A. D. 1871, Horace M. Bliss was and now is the clerk of the same Cass circuit court of the 11th judicial circuit for the State of Indiana; that his signature thereto is genuine, and that his attestation aforesaid is genuine and is in due form of law.

Witness my hand this 16th day of September, 1871, at Logansport, Indiana.

HORACE P. BIDDLE,
Pres't Judge 11th Circuit, Indiana.

The defendant, Alfred H. Knowles, by his counsel, then and there objected to the introduction of the said copy record in evidence upon the following grounds:

1st. The said record shows that the only summons that is ever pretended to have been served on this defendant was the one claiming $3,000, and that judgment was rendered for a greater sum.

2d. The record does not show any service of any summons on this defendant within the jurisdiction of the sheriff of Cass County, Indiana.

92 3d. The certificate of service of the summons upon this defendant does not appear to have been made within the jurisdiction of the sheriff who made it.

4th. The record shows that the Cass circuit court never had jurisdiction of this defendant to render the judgment against him which said record shows it did render.

5th. The record shows that the case is in circuit court of the United States for the district of Indiana.

6th. The record is not properly or sufficiently authenticated.

The court overruled the said objections and admitted the said record in evidence; to which ruling and decision of the court the said defendant by his counsel then and there excepted.

The said plaintiff then rested its case, and the above is all the evidence introduced by said plaintiff in this action.

The defendant, Alfred H. Knowles, by his counsel, then and there produced in court the said defendants, Alfred H. Knowles and
93 Thomas Harvey, and offered them as witnesses in said action, and offered to prove by them and each of them that they nor either of them were ever in any manner served with any process or summons in the said action in the Cass circuit court of which the said record read in evidence purports to be the record.

The plaintiff, by its counsel, then and there objected to the introduction of the said evidence upon the ground that the same was incompetent.

The court sustained the objection and excluded the evidence; to which ruling and decision of the court the said defendant, Alfred H. Knowles, by his counsel, then and there duly excepted. The defendants did not introduce any evidence on their part.

And because the said matters in said bill of exceptions contained do not appear of record in said action, the judge who tried the said action has allowed this bill and signed and sealed the same at the October term of this court, 1871.

93 R. R. NELSON, [SEAL.]
Judge.

To Messrs. CORNELL & BRADLY,
Plaintiff's Attorneys:

94 GENTLEMEN: Take notice that the foregoing is the bill of exceptions proposed by the defendant, Alfred H. Knowles, in the above-entitled action.

Yours, &c.,

BIGELOW, FLANDRAU & CLARK,
Attorneys for Def't Knowles.

(Indorsed:) United States circuit court, district of Minnesota. The Logansport Gas-light and Coke Company *vs.* Alfred H. Knowles et al. Bill of exceptions. Filed March 6, 1872, H. E. Mann, clerk. Bigelow, Flandrau & Clark, defendant's att'ys.

95 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1872, June 24, 1872.

Present, Hon. Samuel F. Miller, Hon. John F. Dillon, judges.

THE LOGANSPORT GAS-LIGHT & COKE COMPANY
vs.
ALFRED H. KNOWLES IMPLEADED WITH THOMAS HARVEY.

The motion for a new trial in this cause coming on to be heard under the order of Mr. Justice Nelson, fixing the hearing for this term, the court declined to hear the same on the ground of the absence of Justice

Nelson, before whom the trial was had, and ordered that the hearing of said motion be postponed until the return of Justice Nelson, without prejudice to the defendant in said action.

United States circuit court for the district of Minnesota.
96 Term minutes, June term, A. D. 1872, July 9, 1872.
Present, Hon. Rensselaer R. Nelson, judge.

THE LOGANSPORT GAS-LIGHT & COKE COMPANY
vs.
ALFRED H. KNOWLES.

And now come the parties to this suit by their attorneys, and submit the motion for a new trial made by the defendant, with leave to either party to bring the same on for hearing upon three days' notice as of this term.

97 U. S. district court, district of Minnesota.

THE LOGANSPORT GAS-LIGHT & COKE CO.
vs.
ALFRED H. KNOWLES.
Def't on judgment of a sister State.

The only point which will be considered upon the motion for a new trial, based upon a bill of exceptions in the case, is that wherein it is alleged the court erred in not permitting the defendants, who were offered as witnesses, to contradict the judgment record. This record stated the fact of a personal service of the summons upon both the defendants by the sheriff, and contains a copy of the original with the return of the officer. All of the facts necessary to give the Indiana court jurisdiction of the persons and of the subject-matter are fully stated in the record.

The defendant's counsel claim that the question raised being a jurisdictional one they have a right to contradict the fact of personal service of process, although it is so stated in the judgment record.

The Constitution of the United States, Article 4, Sec. 1, declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof." By authority of this section, Congress has enacted that "the said records and judicial
98 proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by laws and usage in the courts of the State from whence the said records are or shall be taken."

I have had some difficulty in satisfying my mind as to the extent to which it was intended to give effect to the judgments of sister States by this act of Congress. The authorities are conflicting upon the subject, and there is no adjudication of the Supreme Court of the United States in a case like the one in hand. True, there is a statement in the case of Shelton v. Tiffin, 6 Howard 163, which would seem to foreshadow the opinion of the court at that time, that a personal service of process or personal appearance in court and waiver of process, when contained in the record, cannot be controverted, but in Christmas v. Russell (5 Wal'ace, 305) it is said that "they (judgment records of sister States) are open to inquiry as to the jurisdiction of the court and notice to the defendant." In the State courts there is great confusion upon the subject. The case of Murray v. Starbuck (5 Wend., 148) is the leading on' relied upon to sustain the position taken by the defendant's

counsel, and seems to have been followed pretty generally in the New York courts. The reasoning of Judge Marcy in the case was criticised and rejected by the late Justice McLean (see Sinclair v. Tower, 2 McLean, 473) and by the supreme court of the State of Michigan, (see Wilcox v. Kassick, 2 Mich. R., 165,) but in many of the States it has been followed and approved.

In order to properly understand the decision in Murray v. Star-
99 buck, it is necessary, in my opinion, to examine the law and practice existing at that time in the State of New York in regard to the manner of making up the judgment record for this practice, undoubtedly influenced the court in its decision. It will be found upon examination, that by the practice in the courts of that State, the attorney of the prevailing party prepared the judgment record out of court, after the suit had terminated, and the entries were made by him and not by a particular officer in court. The supervision of the court over the whole course of action was not required by this practice, and the entries, therefore, in a judgment record were such as the attorney saw fit to insert, although by a fiction every thing was supposed to be entered in open court. (See Graham's Practice, Burrell's do., title "judgments in general," &c.)

There was very good reason therefore for permitting a defendant in a suit upon a judgment in the courts of that State to contest any jurisdictional fact, even to the extent of contradicting the statement of personal service of process, or any fact which showed jurisdiction of the person, if the record in all its parts was the act of the attorney, and did not bear the impression of absolute verity. It is true this case (Murray v. Starbuck) goes to the full extent of deciding that, notwithstanding the record, any jurisdictional fact may be enquired into, but to my mind it is clear Judge Marcy had in view the practice with which he was most familiar, and what he said had reference to the status of judicial records similarly situated to those of the State of New York.

100 The authorities compiled by Mr. Bigelow in his excellent work on "Estoppel" seem to me to justify the conclusion laid down by him, viz: "If the allegations in the record as to jurisdiction could not be disputed in the sister State, they must be conclusive throughout the Union," and "we should state the rule to be, that where the record contains an allegation of specific facts sufficient to constitute jurisdiction, parties and privies are estopped to deny the jurisdiction in a suit for the same cause of action, unless the record would be unconclusive in an action upon the judgment in the State in which it was rendered." (Bieglow on Estoppel, pg. 237, and preceding tit. foreign judgments in personam.)

In Indiana this record would be conclusive between the parties without doubt, (23 Indiana, 628, 2 Blackford, 108.) A case on all fours with the one at bar has been decided in that State upholding the conclusiveness of the judgment of a sister State where the record alleges personal service of summons. (Wescott v. Brown, 13 Indiana, 83, explaining Boylan v. Whitney, 3 Indiana, cited by defendant's counsel; see also Roberts v. Caldwell, 2 Dana, 512, 3 Gilman, 197.)

The defendants therefore, in my opinion, are not entitled to a new trial, and the motion is denied.

R. R. NELSON,
Judge.

CORNELL & BRADLEY, *for Plaintiff.*
BIGELOW, FLANDRAU & CLARK, *for Defendants.*

Opinion denying motion for new trial, filed January 31, 1873. H. E. Mann, *Clerk.*

101 United States circuit court for the district of Minnesota, term minutes December Term, A. D. 1872, December 24, 1872.

Present, Hon. Rensselaer R. Nelson, judge.

THE LOGANSPORT GAS-LIGHT & COKE COMpany *vs.* ALFRED H. KNOWLES.

The motion for a new trial in the cause having been heretofore submitted to the court and by the court held under advisement, now the court being fully advised in the premises, it is by the court ordered that the said motion be and the same is hereby denied.

Entered January 30, 1873, nunc pro tunc, by direction of the court.

102 Circuit court of the United States for the district of Minnesota.

THE LOGANSPORT GAS-LIGHT AND COKE COMpany, *vs.* ALFRED H. KNOWLES AND THOMAS HARVEY. } Assignment of errors.

And now comes the said above-named defendant, Alfred H. Knowles, by Bigelow, Flandrau & Clark, his attorneys, and says that in the record and proceedings in the said court in the said above-entitled action, and also in giving the judgment in said action there is manifest error in this, to wit: That in the pretended record of the judgment which is alleged in the declaration in this action to have been rendered in the State of Indiana against the defendant, Alfred H. Knowles, and in the transcript thereof, which was offered in evidence on the trial of this action, it does not appear that the court which rendered said judgment ever acquired jurisdiction of the person of said defendant, Alfred H. Knowles, in this, that the pretended return of the officer set forth in said transcript does not show when said service was made, or that the same was made within the jurisdiction of the officer making the same, or the court which assumed to render judgment on such service.

There is also error in this: the said certificate of service is not evidence for any purpose that any such service was ever made, be-
103 cause the said certificate does not contain any venue, nor anything to show that the same was made within the bailiwick or jurisdiction of the officer making the same.

There is also error in this: That the said transcript, which was given in evidence to prove the rendition of said judgment, shows upon its face that when the said action was commenced wherein said judgment was rendered the process or summons by which the same was commenced only claimed damages against the said defendant for the sum of $3,000, and only gave to said defendant notice that in case of default judgment would be taken against him for the said sum of $3,000, which is the only summons or process in said action which is pretended ever to have been served on said defendant, and that without any further notice to said defendant, or any appearance in said action by said defendant, judgment was rendered against said defendant therein for a much greater sum, upon a pretended amendment of the complaint in said action claiming said greater amount.

There is also error in this: The defendant, Alfred H. Knowles, having pleaded in this action that the said court in the State of Indiana

never acquired jurisdiction of him in any way in the action in said State wherein the said pretended judgment is alleged to have been rendered against him, should have been allowed to prove his said plea and show that no process had ever been served on him in said pretended action, and that he never appeared therein or authorized any one to
104 appear therein for him, and the said court erred in refusing to allow him to make such proof when he produced his witnesses in court on the trial of this action and offered to prove the same.

And the said Alfred H. Knowles prays that the judgment aforesaid so rendered against him in this action for the errors aforesaid, and other many and manifest errors in the said record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of said judgment.

BIGELOW, FLANDRAU & CLARK,
Attorneys for Defendant, Alfred H. Knowles.

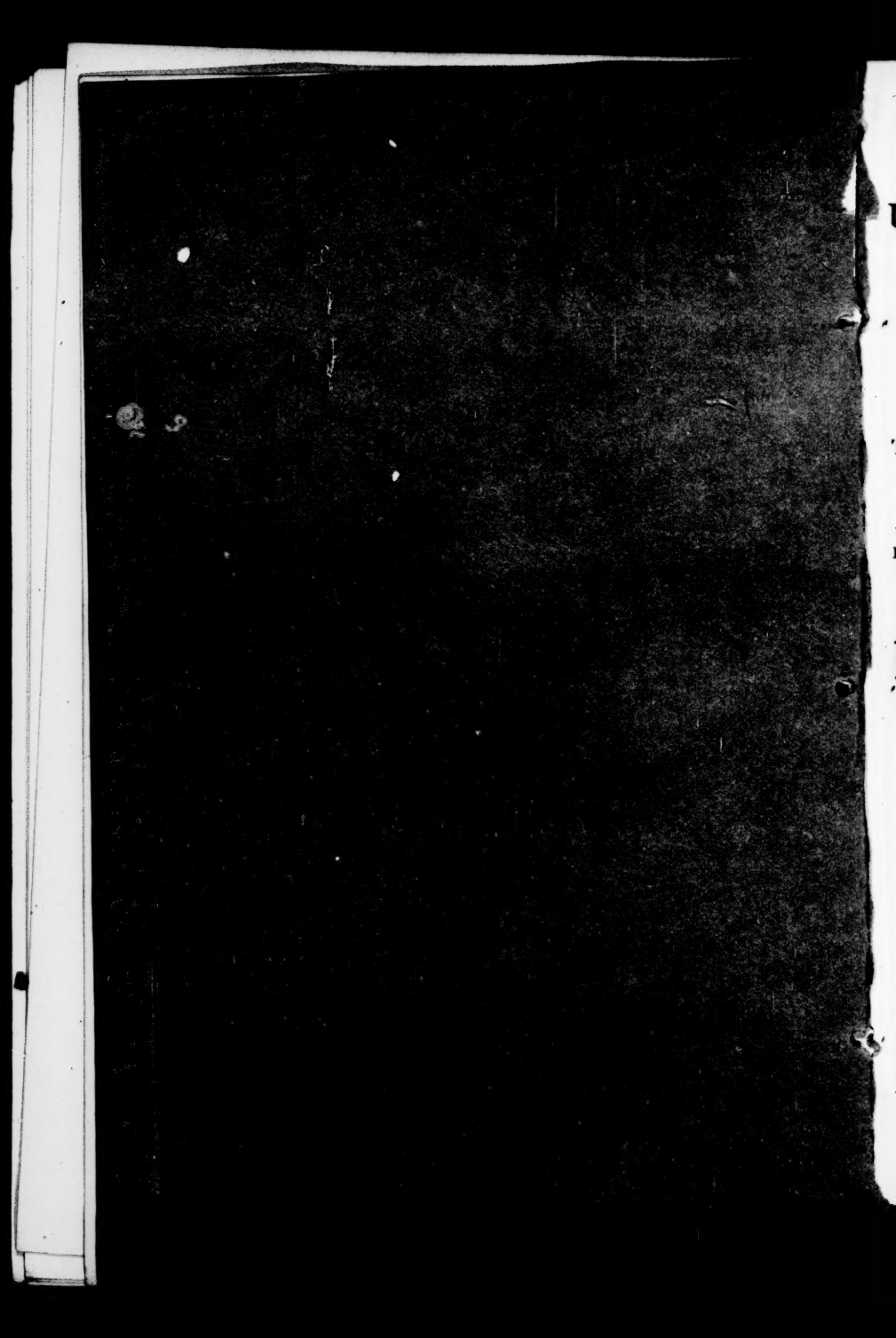
(Indorsed:) Circuit court of the United States, district of Minnesota. The Logansport Gas-light and Coke Company vs. Alfred H. Knowles, impleaded, &c. Assignment of errors. Filed February 18, 1873. H. E. Mann, clerk. Bigelow, Flandrau & Clark, attorneys for defendant, Knowles.

Fees:

To return to writ of error, 247 fol	37 05
" seal to return	20
" writ of error, 1.06, filing 6 papers, 60	1 60
" 3 acknowledgments, bail, 75; cert. same, 15; seal, 20	1 10
" oaths, 2 sureties, 20; cert., 15; seal, 20; docket, 1.00	1 55
	$41 50
Postage	75
	$42 25

104*a* (Indorsed:) U. S. circuit court, dis't of Minnesota. The Logansport Gas-light and Coke Co. vs. Alfred H. Knowles. Return to writ of error.

(Indorsement on cover:) No. 477. Alfred H. Knowles, plaintiff in error, vs. The Logansport Gas-light and Coke Company. Minnesota C. C. U. S. Filed 20th September, 1873.



SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1873.
No. 477.

ALFRED H. KNOWLES,
Plff. in Error,

vs.

THE LOGANSPORT GASLIGHT AND COKE COMPANY,
Deft. in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF OF PLAINTIFF IN ERROR.

HORACE R. BIGELOW,
Counsel for Plff. in Error.

St. Paul Press.

Supreme Court of the United States.

ALFRED H. KNOWLES,
Plaintiff in Error,
vs.
THE LOGANSPORT GAS-LIGHT AND COKE CO.,
Defendant in Error.

BRIEF OF THE PLAINTIFF IN ERROR.

Statement of the points made by the Plaintiff in Error in this court.

This action was brought in the Circuit Court of the United States for the District of Minnesota, on a judgment recovered by the Logansport Gaslight & Coke Company, in the State of Indiana, against Alfred H. Knowles, the plaintiff in error. The complaint in the court below was in the usual form or a judgment, and among others contained this averment: "And the plaintiff avers that said Cass county Circuit Court in which said judgment was rendered as aforesaid, was at the time of the rendition thereof, has ever since been, and now is, a court of general jurisdiction, and had jurisdiction of the parties and subject matter of said action." *Page* 3, *Fol.* 8, *of Record.*

The answer of the defendant Alfred H. Knowles, (who was the only defendant served with process or who answered or appeared, or against whom judgment was rendered in the

court below,) after putting in issue the rendition of the judgment declared upon, also puts in issue the jurisdiction of the Indiana court over his person, in the following language: "And defendant denies that said court ever had jurisdiction of the person of this defendant in said pretended action as alleged in said complaint or otherwise, and denies that said court ever had jurisdiction of this defendant by the service of any process on this defendant, or by the appearance of this defendant in said action in person, or by attorney or in any other manner whatever." *Page* 5, *Fol* 13, *of Record.*

The court will therefore see that the question of the jurisdiction of the Indiana court over the person of the defendant Knowles, is distinctly put in issue.

To sustain the issues on the part of the plaintiff, it introduced an authenticated copy of the record of the Indiana judgment. All that this record contained in reference to the court having obtained jurisdiction over the defendant, is the return of the Sheriff of Cass county endorsed on the summons in the following words: *Page* 27, *Fol.* 72, *of Record.*

"I do hereby certify that I served the within writ on the 19th day of September, 1865, upon Alfred H. Knowles, and Thomas Harvey, personally, by reading the same to them, and I further certify that John W. Bain cannot be found in my bailiwick."

JOHN DAVIS, Sheriff Cass Co.,
By JAMES STANLEY, Deputy."

The court will observe that this return does not show where the service was made, nor has it any *venue* to indicate where the certificate was made.

To the introduction of this copy-record, the defendant Knowles interposed the following objections: *Page* 35, *Fols* 91, 92.

1st.—The said record shows that the only summons that is ever pretended to have been served on this defendant, was the one claiming $3,000, and that judgment was rendered for a greater sum.

2d.—The record does not show any service of any summons on this defendant within the jurisdiction of the Sheriff of Cass county, Indiana.

3d.—The certificate of service of the summons upon this defendant, does not appear to have been made within the jurisdiction of the Sheriff who made it.

4th.—The record shows that the Cass Circuit Court never had jurisdiction of this defendant, to render the judgment against him which said record shows it did render.

5th.—The record shows the case is in the Circuit Court of the United States for the District of Indiana.

6th.—The record is not properly or sufficiently authenticated.

These objections were overruled and the defendant excepted. *Page* 36, *Fol.* 92, *of Record.*

After the plaintiff had introduced the copy record and rested, the defendant Knowles presented himself and Thomas Harvey, as witnesses, and offered to prove by them that no process had ever been served on the defendant Knowles in the suit in which the Indiana judgment was rendered, and that said court never did obtain jurisdiction over his person. *Page* 36, *Fols.* 92, 93, *of Record.*

This testimony was objected to by the plaintiff, and was ruled out by the court, and the defendant duly excepted. *Page* 36, *Fol.* 93, *of Record.*

Three questions are raised upon the jurisdiction of the Indiana court by these proceedings. They are:

1st.—Does the copy record show jurisdiction on its face over the person of the defendant Knowles?

2d.—If it does, can such fact be contradicted on the trial of this action?

3d.—Does it show jurisdiction to render a judgment for more than $3,000?

POINT I.

We claim that the record should show on its face that the court had jurisdiction of the person of the defendant, and that this record fails in this respect. We cite *Allen vs. Blunt*, 1 *Blachford, Circuit Ct. R.* 480; decided by Judge Nelson. The suit in that case was brought in New York, upon a judgment rendered in the State of Massachusetts. The copy record introduced contained the following return of the Marshal:

"United States of America, Mass. District, ss.

"BOSTON, June 24, 1846.

"On this 24th day of June, 1846, I gave to the within named Orison Blunt, in hand, a true and attested copy of the within notice. I have made diligent search for the within named William J. Syms, and cannot find him within my district, so that I can notify him of the within process.

"ISAAC O. BARNES, Marshal."

The court held that this return was fatally defective in not showing that the service was made within the district of Massachusetts. And this holding was made by the court on its own suggestion, no such question having been raised in the case by counsel.

The similarity of the case with the one at bar is so striking, that no comment can aid the court, we simply ask a perusal of the opinion of Judge Nelson, and we think the court will agree with us that the point is well taken. We also cite the following cases bearing upon the question, although not so directly in point, and ask their examination by the court:

Dun vs. Dun, 4 *Paige*, 425.
Arnold vs. Tourtelotte, 13 *Pick.*, 172.
Fenton vs. Garlick, 8 *John.*, 194.

The return is equally defective in not showing on its face that it was made by the officer within his jurisdiction. There is nothing to indicate where this certificate was made. It is the official character of the officer that makes his certificate evidence of any fact, and that character ceases when he is without the limits of his bailiwick. The certificate of a private citizen is never evidence of anything. Now this Sheriff possesses no more authority without his county either to serve a writ, or certify that he has served it, than a private citizen; hence the necessity of both facts appearing affirmatively on the face of the return, to-wit: That the service and the evidence of it were both made within the jurisdiction of the officer. These being jurisdictional facts nothing can be implied. Presumptions in favor of the performance of duty by officers of the law never extend to the supplying of jurisdictional facts.

Allen vs. Blunt, 1 *Blatchford, C. C. R.* 480.

POINT II.

We claim that the court below erred in excluding the evidence offered to show that the Indiana court that rendered or attempted to render the judgment, never had obtained jurisdiction of the person of the defendant Knowles. We know that there is an apparent conflict in the decisions of the courts upon this question, but after a very thorough examination of all the authorities that have been accessible to us, we feel confident in saying that the rule is settled that when a judgment rendered in one State is sued upon in another, the question of the jurisdiction of the court that rendered it, either over the person of the defendant or the subject of the action, is open to investigation, and that this is so, as well whether the record avers jurisdiction as when it is silent. As well when the jurisdiction is made to appear by the return of an officer, as by a recital in any part of the record. In fact we assert that no form of record can be devised that will conclude the defendant from testing the question of jurisdiction when that record is attempted to be enforced against him in another State.

In opening the argument in support of this broad proposition, we cannot perhaps do better than to quote from the language of this court as delivered by Mr. Justice Wayne in the case *Williamson vs. Berry*, 8 *How., at page* 540. Which certainly is broad enough to cover all the ground claimed by us in this case. He says: "We concur that neither orders nor decrees in chancery can be reviewed *as a whole* in a collateral way. But it is an equally well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject, may be enquired into in every other court when the proceedings in the former are relied upo n, and brought before

the latter, by a party claiming the benefit of such proceedings.

"The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the law of nations, the practice in chancery, or the municipal laws of States."

In support of this doctrine, this court in the case last cited refer to the following cases which fully sustain it:

Glass et al. vs. Sloop Betsey, 3 *Dall.*, 6.
Rose vs. Himely, 4 *Cranch.* 241.
Elliott vs. Piersol, 1 *Pet.*, 328–340.
Wilcox vs. Jackson, 13 *Pet.*, 499.
Shrivers Lessees vs. Lyme, 2 *How.*, 59
Lessee of Hickley vs. Stewart, 3 *How.*, 750.

There are other cases decided in this court which we will have occasion more particularly to refer to and quote from as we progress with the discussion, that are decided directly upon the question of enquiring into the jurisdiction where the judgments of one State are attempted to be enforced in another. We believe the rule to be universal, that jurisdiction may be questioned at all times and in all places.

The courts of the States are in accord with this court on the subject of inquiring into the jurisdiction of all courts whenever their judgments are sought to be enforced, and the decisions of the State and Federal courts are interchangeably cited in support of each other. We call your Honor's attention to the case of *Adams vs. Saratoga & Washington R. R. Co.*, 10 *N. Y.* 328. The distinguished jurist who delivered the opinion of the court in this case, after citing many cases in support of the right to enquire into the jurisdiction of the

court whose judgment was under consideration, including *Williamson vs. Berry*, 8 *How.*, 494, makes use of this very practical and common sense remark which covers the whole question, and commends itself to the reason of every man. He says:

"The idea is not to be tolerated that the attorney could make up a record or decree, reciting that due notice was given to the defendant of the proceeding when he never heard of it, and no notice was published, and the decree held conclusive against an offer to show this vital allegation false. Or suppose a record is fictitious throughout, cannot the defendant prove the want of jurisdictional facts?"

It seems to us to be a most monstrous idea, and not to be for a moment tolerated, that any court or officer of a court can make up a record against a party who has never heard of the proceeding, and by a false averment of jurisdictional facts, conclude the defendant from any inquiry into the matter. Such a rule would be in direct violation of every fundamental principle of natural justice, and enlightened jurisprudence. Every man is entitled to his day in court. No man can be condemned unheard. Yet the rule contended for by our adversaries in this case, involves all these possible outrages. If any court has ever held any such dangerous doctrine, it is time this court should prevent its recurrence.

Upon what ground is this startling proposition advanced? It is said that this is a record, and that a record imports verity and is conclusive. To dissipate this thin sophism, we prefer to quote the language of that very profound logician, Mr. Justice Wm. L. Marcy, expressed in the case of *Starbuck vs. Murray*, 5 *Wend.*, *at page* 158. He said:

"But it is strenuously contended that if other matter may be pleaded by the defendant, he is estopped from asserting

anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It seems to me that this proposition assumes the very proposition to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to the original action, all the State courts with one exception agree in opinion that the paper introduced as to him is no record; but if he cannot show even against the pretended record that fact, on the alleged ground of the incontrolable verity of the record, he is deprived of his defence by a process of reasoning that is to my mind little less than sophistry.

The plaintiff in effect declares to the defendant:

"The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrolable verity, and the record makes the appearance an unimpeachable fact"

Logical minds such as that of Judge Marcy, naturally revolt from such legal chicane.

It may be urged that the case cited from 10 *New York Reports*, and some of the decisions of this court were upon the judgments of courts of special and limited jurisdiction, or were upon special proceedings, and that the rule is different in regard to the judgments of courts of general jurisdiction in ordinary common law actions.

The answer is given by Mr. Justice Bronson, in the case of *Bloom vs. Burdick*, 1 *Hill, at page* 139 *of the opinion*. The court says:

"It is a cardinal principle in the administration of justice, that no man can be condemned, or divested of his right, until he has had the opportunity of being heard. He must either by serving process, publishing notice, appointing a guardian, or in some other way be brought into court; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance. *This is the rule in relation to all courts*, with only this difference, that the jurisdiction of a superior court will be presumed until the contrary appears; whereas an inferior court and those claiming under its authority, must show that it had jurisdiction.

Foot vs. Stevens, 17 *Wend.*, 483.
Hart vs. Seixas, 21 *Wend.*, 40.

As we said before, the rule which permits an enquiry into the jurisdiction, is not confined to cases of judgments of one State being sued upon in another State. It is universal in its application to all times and occasions. We call your Honor's attention to the case of *Dozier vs. Richardson*, 25 *Georgia*, 90. It was a motion to set aside a record which recited that the party had been personally served with a *scire facias*. He was allowed to disprove the record and show that he had not been so served, because the question was jurisdictional. The reasoning of the court is so pointed and conclusive, that we quote it. The court says:

"It is no doubt true that a judgment rendered against a man by a court that has jurisdiction to render it, is conclusive against him if not obtained by fraud. But does a court have jurisdiction to render a judgment against a man who has never had notice of the suit and who does not appear to the suit? Most certainly not.

"Can it get this jurisdiction by falsely reciting in some proceeding in the suit that the man was notified of the suit, or that he appeared to it? Nobody will say so.

"But we have to say so in effect, if we say that such recitals are conclusive on the man. This must be manifest.

"It follows then we cannot say so."

It is difficult to determine which is the most admirable statement of the question, this sylogistic demonstration by the Georgia court, or the more elaborate reasoning of Judge Marcy above quoted, from 5 *Wendell*, both are necessarily conclusive.

There are various ways in which a judgment may be attacked in the State where it is rendered, for want of jurisdiction in the court that rendered it, regardless of whether the record shows jurisdictional facts or not; for instance, a motion may be made in the court in which the judgment was rendered, or a bill in equity may be filed to restrain its enforcement, and in either case the question of jurisdiction may be enquired into.

Dozier vs. Richardson, 25 *Georgia*, 90.

We will now refer your Honors to the rulings of the various States upon the point of contesting the jurisdiction of judgments brought into them from other States for enforcement.

MASSACHUSETTS.

Bissell vs. Briggs, 9*th Mass.*, 462.

"They may be declared on as evidences of debt, or of promises, and on the general issue, the jurisdiction of the court rendering them is put in issue, but not the merits."

NEW YORK.

Starbuck vs. Murray, 5 *Wend.*, 158.
Shumway vs. Stillman, 4 *Cow.*, 292; 6 *Wend.*, 447.
Bradshaw vs. Heath, 13 *Wend.*, 407.
Kerr vs. Kerr, 41 *N. Y.*, 272.
Hoffman vs. Hoffman, 46 *N. Y.*, 30.

In the last case cited, the court says at *page* 33: "It is the settled doctrine of this State, that such record is not conclusive as to the question of jurisdiction. It is not conclusive even though it state facts which give the court jurisdiction, but these alleged facts may be shown to be untrue."

Noyes vs. Butler, 6 *Barb.*, 613.

CONNECTICUT.

4 *Conn.*, 380.

NEW JERSEY.

Curtis vs. Gibbs, 1 *Pennington*, 399.

NEW HAMPSHIRE.

1 *N. H.*, 246; 7 *N. H.*, 257.

INDIANA.

Holt vs. Alloway, 2 *Blackf.*, 108. In this case Judge Blackford says: "In such case he must be permitted to plead the

fraud or the want of jurisdiction of the person or of the cause, in bar of the suit. The common principles of justice seem to demand that such should be the construction of the act of Congress, and there is good authority for saying that such construction is in accordance with the principles of law."

ARKANSAS.

Kimberly vs. Merrick, 20 *Ark.*, 12.

FLORIDA.

Brosswell vs. Donn, 11 *Florida*, 62.

ILLINOIS.

Whitacre vs. Murray, 15 *Ill.*, 293.
Thompson vs. Emmert, 15 *Ill.*, 415.

The Illinois cases go to the point that the record of a judgment of a sister State, which recites that the defendant appeared by attorney, may be contradicted by showing want of authority in the attorney to appear. The cases are therefore not exactly in point, but illustrative.

WISCONSIN.

Rape vs. Heaton, 9 *Wisconsin*, 328. In this case the court illustrates the propriety of allowing averments of jurisdiction in a record to be contradicted as follows:

"A party would probably not be precluded from showing that a paper offered against him as a record was a forgery.

But suppose it contained an allegation that it was not a forgery, would he then be precluded? Manifestly not, because on the theory that it was a forgery, the allegation in itself that it was not, would fall with the rest of it, so as to these averments as to jurisdictional facts."

IOWA.

Baldwin vs. Pollard, 22 *Iowa*, 328. The opinion in this case was given by Mr. Justice Dillon, who has since become Circuit Judge of the United States for this circuit. He however did not sit in the trial of the case at bar. He says:

"In an action on a foreign judgment (this one was rendered in Missouri) the better reason and the weight of modern authority alike are, that the judgment debtor may successfully defend by showing that he was not served with process. This is as we understand the reason of the rule, he may by evidence establish the fact that the foreign court had no jurisdiction over him, and may do this notwithstanding the record entry may recite that he was served or duly served. If it is clearly shown that the foreign court had no jurisdiction over him, its recitals are worthless."

Harseley vs. Blackman, 20 *Iowa*, 161.

VIRGINIA.

Wilson et al. vs. The Bank of Mt. Pleasant, 6 *Leigh*, 520.
Wynn vs. Watt's Admr., 11 *Leigh*, 584.

See also

Arnott vs. Webb, 1 *Dillon, C. C. R.* 362.

There seems to be great unanimity in the State courts upon this point, and the reasoning upon which their decisions are founded, seems to us to be conclusive and unanswerable. But we claim that the Supreme Court of the United States is equally committed to the same doctrine.

The case of *Mills vs. Duryee*, 7 *Cranch*, 481, is the one relied upon generally, as holding the judgments of one State conclusive upon the parties named in the record when sued in another State. The case will not bear any such interpretation The only point decided in it is, that *nil debit* is not a good plea in an action upon the judgment of another State. There is no doubt about the correctness of this decision, and wherever the court speaks of the conclusiveness of the record, it is speaking of the merits and nothing else, because nothing else was raised by the plea of *nil debit*. Had the defendant pleaded as we do in this case, that the court which rendered the judgment had no jurisdiction of the person of the defendant, there is no doubt, (judging from the subsequent decisions of the same court) that the plea would have been sustained, and the proof allowed to support it. All this case decides therefore, is, that the judgment is as binding in the State where sued upon, as it is in the State where rendered, if authenticated properly under the act of Congress, and that it is conclusive on the merits as long as the jurisdiction remains unquestioned.

We call the attention of the court to the case of *D'Arcy vs. Ketchum*, 11 *How.*, 165, where this court discusses the case of *Mills vs. Duryee*, and the act of 1790, and limits their operation within the rules we have above contended for.

We call the attention of the court to the case of *Webster vs. Reid*, 11 *How.*, 437, where a party attempted to show title to lands in the Territory of Iowa, under a judgment recorded in

that territory. The defendant among other things offered to show that the defendants in the judgment were never served with process in the action. The court below ruled the evidence out, and this court held that it should have been admitted, saying in the opinion, "When a judgment is brought collaterally before the court as evidence, it may be shown to be void upon its face by want of a notice to the person against whom the judgment was entered, or for fraud." Now if this may be done when the judgment is merely relied on collaterally, *a fortiori* it may be done when the judgment is sued upon directly, and issue taken upon the fact of jurisdiction.

See also the case of *Harris vs. Hardeman*, 14 *How.*, 334, and the cases there cited, and the case of *The Lafayette Ins. Co. vs French*, 18 *How.*, 404, where the court at *page* 406, in discussing the act of Congress of May 26, 1790, says: "Whenever an action is brought in one State upon a judgment recovered in another, it is not enough to show it to be valid in the State where it was rendered; it must also appear that the defendant was either personally within the jurisdiction of the State, or had legal notice of the suit, and was in some way subject to its laws so as to be bound to appear and contest the suit, or suffer judgment by default. In more general terms, the doctrine of this court, as well as of the courts of many of the States, is, that this act of Congress was not designed to displace that rule of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result." And the court cites *D'Arcy vs. Ketchum*, 11 *How.*, 165, in support of this rule.

This is exactly what we contend for in this action. We plead that we were never served with process in the Indiana court, and having made the issue we must be allowed to prove it, or the act of Congress of May 26, 1790, would work a re-

sult that this court and the courts of the several States have never accorded to it.

We particularly call the attention of the court to the recent case of *Christmas vs. Russell*, 5 *Wallace*, 290. The action was brought in the State of Mississippi, on a judgment rendered in the State of Kentucky, a number of pleas were interposed by the defendant, and full argument had in this court. Mr. Justice Clifford, in giving the opinion of the court at *page* 305 of the reported case, classifies the decisions of the courts upon the subject of the status of judgments rendered in one State, and sued upon in the courts of another State. He divides the cases into two classes. 1st Those which hold such judgments in all respects as domestic judgments. 2d—Those which hold them to be foreign judgments. He declares that neither of these classes of cases are quite correct. They are not foreign judgments, because by the Constitution, and laws of Congress, they are entitled to the same faith and credit in all courts within the United States, which they possessed in the State where they were rendered Neither are they domestic judgments in every sense, because process for their enforcement cannot be issued on them out of the State where they were rendered. Having made this clear statement of the standing of these judgments the court points out this further attribute which characterizes them in all instances:

"*Besides, they are open to enquiry as to the jurisdiction of the court and notice to the defendant.* * * * *Subject to these qualifications*, the judgment of a State court is conclusive in the courts of all the other States wherever the same matter is brought in controversy."

It was just this qualification that we set up and sough' to prove, but were prevented from doing by the erroneous ruling of the court below.

The next case in order of time decided in this court which bears upon the point under discussion is *Cheever vs. Wilson*, 9 *Wallace*, 108. In this case the validity of a judgment rendered in the State of Indiana, was brought in question in the courts of the District of Columbia. The jurisdiction of the Indiana court depended upon the residence of the plaintiff in the county where the suit was commenced at the time of its institution. The decree found the plaintiffs' residence to be within the county. One of the questions in the case was whether this jurisdictional fact could be contradicted. The court in its opinion at *page* 123 of the reported case concedes that it may, and while holding that it is not necessary to decide the point in that case, they say: "The finding is clearly sufficient until overcome by adverse testimony, none adequate to that result is found in the record. Giving to what there is, the fullest effect, it only raises a suspicion that the *animus manendi* may have been wanting." Thus admitting the propriety of contradicting by testimony the jurisdictional fact of the residence of the plaintiff. It is evident also from this case that the jurisdictional fact appearing in the record was attacked by evidence in the court below, and would have been successful, had the evidence been sufficient to satisfy the court of the non-residence of the plaintiff, and that this court sanctioned the admission of the evidence which went to contradict the finding of the jurisdictional fact found in the decree.

There are many other authorities bearing on this point, but it seems unnecessary to burthen a brief with any more of them.

It may be contended that while a mere averment in a record of the fact that the court had jurisdiction of the person of the defendant may be contradicted, the return of an officer of personal service of the process is not subject to question. This

position cannot be maintained for a moment. All the sanctity that can be claimed for any part of a record, is because *it is a record*, and as a record imports verity. If established to be a record, it is *all* true, no one part is more sacred than another. It makes no difference how the averments appear in it, whether by findings in the decree, statements in the minutes of the court, or the returns of officers, they are all parts of the record, and derive all the authority they possess from that fact alone. Their verity does not depend upon *how* they appear in the record, but upon the fact that they *are* there, no one part of the record therefore can possess more force, or import greater verity than another. So that if we are right in our view that the jurisdictional facts may be put in issue and disproved, then it is because they *are* jurisdictional facts, and not because they appear in the supposed record in any particular form.

The court must bear in mind that we do not claim the right by this plea, and offer of proof, *to contradict a record*, our position is, that by our plea we say *it is not a record, never was a record;* that not having acquired jurisdiction of the defendant the court could not endow this paper with any of the attributes of a record, and being allowed to show that fact, the whole verity with which it is *prima facie* invested, disappears, and the pretended record falls to the ground.

It cannot be possible, that our American jurisprudence is so brutally defective as to allow any of the thousands of courts that exist throughout the Union, many of which are utterly without learning, character or responsibility, to make up a record through their officers and attorneys, who in many instances are even less reliable than the courts they practice in, and by a simple false assertion of jurisdiction whether made by design or ignorantly, establish a debt against a defendant

from which he has no possible escape. Any of your Honors are as liable to be ruined by the establishment of such a rule as our humble client who now prays simply for his day in court.

The doctrine contended for by our adversaries is so fraught with danger, so liable to all kinds of abuse, so contrary to all sound and recognized principles of justice, so wholly unnecessary, and so contrary to the great weight of authority, that we feel confident the court will record itself against it, and especially as the decision in this case will become the rule for the future all over the land.

We call attention to a new work called FREEMAN ON JUDGMENTS, which discusses this question very intelligently. *Section* 562, *at pages* 466–7, relates to the point under consideration, and the author thinks the decision of this court in *Christmas vs. Russell*, 5 *Wall.*, 290, indicates that the court will hold that jurisdictional points may be enquired into.

Thus far we have treated the subject on general principles governing judgments. We will now endeavor to show that there is nothing in the laws or practice of the State of Indiana, that takes this judgment out of the general rule. In asking this court to permit us to question the jurisdiction of the Indiana court, we ask no more than is allowed in the courts of that State. A motion to vacate this judgment in the Indiana court that rendered it, or a bill in equity to restrain its enforcement filed in that State would have been sustained upon the same grounds we here urge, and therefore our adversaries claim a greater degree of faith and credit for this judgment than would have been accorded to it in the State where it was rendered.

Mitchell's Admr. vs. Gray, 18 *Ind.*, 123.
Bliss vs. Wilson, 4 *Blackf.*, 169.

Smith vs. Myers, 5 *Blackf.*, 223.
Homer vs. Doe, 1 *Ind.*, 130.
23 *Ind.*, 628; 2 *Blackf.*, 108.

We think upon examination of the statutes of Indiana, that the practice is quite as liberal in regard to opening and vacating judgments as in any of the States, we find no provision that in any way curtails the general powers of the courts in this respect.

POINT III.

The Indiana judgment is void in another respect, for want of jurisdiction, which appears on the face of the record.

The original summons which the Sheriff returns, that he served on the defendant, notified him that if he failed to defend the plaintiff would take judgment against him for $3,000. *See page 27 of the Record.* There is no pretence that any other summons was ever served on the defendant. The original complaint filed, claimed the same sum as the summons. *See page 19 of Record.*

The defendant may have been willing to allow judgment to go against him for $3,000, and for that reason may have refrained from appearing in the action, and suffered a default. The plaintiff having obtained the default, then amends its complaint and claims $10,000. (*See page 25 of Record.*) It then issues a new summons claiming $10,000, but never served it on any one, but defendant Bain who was served in the city of New York. (*See page 26 of Record.*) At a subsequent date, no one appearing, the old summons claiming $3,000 with the old proof of service was produced, and upon that summons and service judgment was entered against the

defendant for between seven and eight thousand dollars *See page 27 of Record.*

We claim that the whole of the proceedings by which the claim was raised above the $3,000 originally claimed, were without jurisdiction and void on their face. The defendant never had any notice of any part of the claim exceeding the $3,000. He never had any day in court as to this excess. Had he been served with this new summons claiming more than the $3,000, it is to be presumed he would have appeared and defended. The court had no power to allow an amendment which amounted to a new cause of action against the defendant, without calling him into court to defend himself against it.

See May et al. vs. State Bank, 9 *Ind.*, 233
Alsop vs. Wiley, 17 *Ind.*, 452.
Nudenberger vs. Campbell, 11 *Miss.*, 359.
Conter vs. Reynolds, 6 *Texas*, 561.

These cases sustain generally our position on this point.

POINT IV.

The judgment should be reversed and a new trial granted.

HORACE R. BIGELOW,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

ALFRED H. KNOWLES, Plaintiff in Error,

vs.

THE LOGANSPORT GAS LIGHT AND COKE CO.,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

1. The record of the Cass Circuit Court of the State of Indiana, shows that that court had jurisdiction of the defendant, Alfred H. Knowles, (the plaintiff in error herein.) The summons in the action in that court was dated September 18th, 1865, and by the endorsement of the Sheriff thereon, appears to have been personally served upon said defendant the following day, September 19th, 1865.

See page 27, folios 71 and 72 of Record.

The service of the summons and the Sheriff's return thereon is sufficient. *Sec. 35, page 35, Vol. 2, Rev. Stat. Ind., 1852,* is as follows: "The summons shall be served either personally on the defendant, or by leaving a copy thereof at his usual and last place of residence."

Sec. 37, same page and vol., enacts: "No summons, or the service thereof, shall be set aside or be adjudged insufficient, where there is sufficient substance about either to inform the party on whom it may be served, that there is an action instituted against him in court."

The Sheriff's return was in form sufficient under the Indiana statute.

Sec. 292, page 95, vol. 2, Rev. Stat. of Ind. 1852, enacts: "The proof of the service of any process issued by the court, or of any notice required to be served upon any party, shall be as follows:

"*First.* If served by the Sheriff, his certificate thereof; or,

"*Second.* By any other person, his affidavit thereof; or,

"*Third.* In case of publication, a printed copy, with the affidavit of the printer, his foreman, or clerk, or of any competent witness.

"*Fourth.* The written admission of the defendant. The *affidavit or admission must state the time and place of service.*"

It follows, necessarily, that the certificate of the Sheriff need not state time nor place. He is a sworn officer, and the presumption is that his acts are done within the scope of his authority.

The Sheriff returns that he personally served Knowles and Harvey, and that Bain, another defendant, cannot be found within his bailiwick. By necessary inference the parties served *were* within his bailiwick. As to sufficiency of return, we cite,

Colerick et al. vs. Hooper, 3 *Indiana,* 316,
Adams vs. Kems, 11 *Indiana,* 346,
Cartul vs. Hiday, 13 *Indiana,* 536.

The case of *Allen vs. Blunt, 1 Blatchford C. C. Reps. 480,* was decided with reference to the language of the Judiciary act of 1789, which is as follows: "And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

1 U. S. Stat. at large, p. 78, Sec. 11.

It appeared by the record, that plaintiff in that suit was a citizen and resident of Connecticut, and defendants were citizens and residents of New York. Under the statute above quoted, it is manifest that unless the defendant was served within the district of Massachusetts, where the suit was brought, the court had no jurisdiction *of any kind* in the suit. The *place* of service, therefore, became material. Had defendant been a citizen and resident of Massachusetts, and had it so appeared by the record, it cannot be doubted that the return would have been sufficient.

In Dun vs. Dun, 4 *Paige* 425, *Arnold vs. Tourtellotte,* 13 *Pick.* 172, *and Fenton vs. Garlick,* 8 *John.* 194, the record in each case shows that there was *not* any legal service; in other words the very paper offered as a record in each of those cases, showed on its face the *want of jurisdiction* of the court, in the action of which such paper purported to be a record.

The officer in the case at bar, returns that he served the summons personally upon defendant, (plaintiff in error,) by reading it to him. The presumption of the law is that he served it within his bailiwick.

If evidence could be received to overcome this presumption *in any case,* it could not have been received in this case under defendant's denial in his answer, *page* 5, *folio* 13 *of record,* nor was such evidence offered on the trial. Counsel for defendant Knowles offered to prove by said Knowles and Thomas Harvey (another defendant) that they, nor either of them were in any

manner served with any process or summons in the said action in the Cass Circuit Court. *See page* 36 *folio* 93 *of Record.*

Counsel for plaintiff in error, in his brief adds to that offer the legal conclusion: "and that said court never did obtain jurisdiction over his person." Reference to the record, will correct counsel's mistake, as to the terms of the offer.

The presumption therefore, that the Sheriff acted within the scope of his lawful authority, is uncontradicted, and there was no attempt, nor offer, to contradict it, nor could there be under the pleadings.

2. The decision of the court below excluding the evidence offered to contradict the record of the Indiana Court is not error. The answer of defendant Knowles does not contain a sufficient denial of the jurisdiction of the Indiana Court; it is as follows:

"And defendant denies that said court ever had jurisdiction of the person of this defendant, in said pretended action as alleged in said complaint or otherwise, and denies that said court ever had jurisdiction of this defendant by the service of any process on this defendant in said action, or by the appearance of this defendant in said action, or by attorney or in any manner whatever."

To raise the question of the jurisdiction of the court in which the judgment relied upon, is rendered, it must be alleged, not only that there was no service of process and no appearance of defendant, but also, that defendant was not within the jurisdiction of the court at the time when the action was commenced or the judgment was rendered.

Holt vs. Alloway, 2 Blackford, 108.

Bimelar vs. Dawson, 4 Scammon, 536.

Welch vs. Sykes, 3 Gilman, 197.

Wiley et al. vs. Pratt et al. 23, Ind., 628.

Lafayette Ins Co. vs. French, et al., 18, How, 404-406 of opinions.

The offer of evidence goes no farther than the denial in the answer. *Page 36, fol. 93, of record*, shows the extent of the offer; its language is as follows:

"And offered to prove by them and each of them, that they nor either of them, were ever in any manner served with any process or summons in said action in the Cass Circuit Court, of which the said record read in evidence, purports to be the record."

Neither the allegation in the answer, nor the offer of proof was sufficient, even if the record of the Cass Circuit Court should be held only *prima facie* evidence of its jurisdiction.

But we claim that in this case the record is conclusive upon the question of jurisdiction, as well as upon the merits, and parol testimony to contradict it, is inadmissable. While it must be admitted that there has been some confusion in the decisions of the State Courts upon this question, we think an examination of these decisions with reference to the facts in each case, and eliminating from those cases merely *obiter dicta*, it will appear that there is little real conflict.

The case of *Starbuck vs. Murray, 5 Wend. 148*, is the leading case in support of the claim of plaintiff in error. In this case the record recited the appearance of the defendant, and the court held such recital only *prima facie* evidence of the appearance.

The learned judge who tried *this* case in the court below, in his decision, *page 88, folio 99 of record*, suggests, that the decision in Starbuck vs. Murray, was made, in view of the practice allowing the judgment record to be made up out of court by the attorney of the prevailing party. This view is sustained by a remark in the latter part of Judge Marcy's opinion in that case, *on page 160, 5, Wend.* "Under the operation of such a rule, a court could always sustain its jurisdiction if it had any solicitude to do so: or rather the party who had the benefit of its decision and *who, by the practice of most tribunals*

is entrusted with making *the record*, would not fail to put it beyond the power of his opponent to show a want of jurisdiction." While the decision in Starbuck vs. Murray, is perhaps broad enough in its terms to sustain the proposition of plaintiff in error, yet if considered in reference to the facts in that case, it only decides, that the recital in the record "*that the defendant appeared in the suit*," might be overcome by the plea and proof that the defendant was never served with process nor ever appeared in person nor by attorney.

This decision has been disregarded in several cases as we shall hereafter show; but at all events is not necessarily applicable to the case at bar.

The case of *Williamson vs. Berry, 8 How. page* 495, referred to by counsel for plaintiff in error, is a case where the record showed upon its face that the Court of Chancery of the State of New York, had, in the matter set forth in the record, exceeded its jurisdiction. No attempt was made to *contradict* the record; the decision of the case was made upon an inspection of the record itself.

The cases referred to by Mr. Justice Wayne, in his decision in that case, and cited in brief of Plaintiff in Error, *on Page* 7 of said brief, are all of them cases where the *want of jurisdiction* of the Court from which the record emanated, appeared on the *face of the record itself*. None of these cases are in point. The case of *Adams vs. Saratoga & Washington R. R. Co., 10 N. Y., 328*, arose under a statutory proceeding to condemn land for railroad purposes, in a court of limtted jurisdiction, and has no application to the case now before the Court.

Bloom vs. Burdick, 1 Hill, 130–139; Foot vs. Stevens, 17 Wend., 483, and Hart vs. Seixas, 21 Wend. 40, all sustain a familiar rule of law in relation to the jurisdiction of Courts, and we see no occasion to criticise them, as we are unable to perceive that they have any bearing upon this case.

In *D'Arcy vs. Ketchum et al., 11 How. 165*, the record showed that plaintiff in error was not served with process, and did not appear. *Webster vs. Reid, 11 How. 437*, has no bearing upon this case.

In *Harris vs. Hardeman, 14 How. 334*, the record shows that there was no legal service of process.

We have cited the case, *La Fayette Ins. Co. vs. French, 18 How. 404*. We need not refer to it further. So far as it is applicable, it sustains the decision of the court below.

Christmas vs. Russell, 5 Wallace, 290, mainly discusses the effect of a State statute of limitation. So far as it has any application to the case now before the Court, it is not unfavorable to the decision of the court below.

In *Cheever vs. Wilson, 9 Wallace, 108*, cited by counsel for plaintiff in error, in his brief, *page 18*, we simply desire to quote a few words of the decisions which precede those quoted in brief of counsel, on the page referred to.

The Court say:

"Whether this finding is conclusive, or only *prima facie* sufficient, is a point on which the authorities ate not in harmony. We do not deem it necessary to express any opinion upon the point." Then follows the language quoted by counsel for plaintiff in error.

The cases cited on pages 20 and 21, from Indiana reports, are none of them in point, and while we do not desire to encumber our brief with a statement of the questions determined in those cases, we call the attention of the Court to them, and claim that they do not in any manner sustain the proposition claimed by counsel for plaintiff in error.

The same may be said of the other cases cited by counsel on pages 12, 13 and 14 of his brief, most of which we have examined, and none of which, so far as we have discovered, conflict with the conclusion arrived at by *Mr. Bigelow, in his work on Estoppel*, cited by the court below in his decision, *page 38, folio 100 of Record.*

We quote from that work the conclusions of the author, found in *chapter 6, commencing on page 185*, and respectfully ask the attention of the Court to so much of that chapter as treats of the subject under consideration.

After commenting upon many cases wherein the question of the conclusiveness of the record of a court as to its jurisdiction was considered, *on page 229* the author says:

"Parties and privies, then, will not be precluded from inquiring into the jurisdiction—

"1. When the record is silent upon the subject:

"2. When it recites simply an appearance of defendant by attorney:

"3. When it is ambiguous, obscure or inferential.

"Thus far there is no serious conflict, and the law is well settled: the next step brings us into confusion. It will, however, appear, as we proceed, that the weight of authority is pretty strongly upon one side."

After discussing the decisions of various courts, in cases where the record of the judgment of a State in the Union "contains a statement of matters sufficient to constitute jurisdiction," the learned author of the work on Estoppel, before referred to, says, on *page 236*—"But, upon principle, we do not see how the doctrine in Starbuck vs. Murray can be sustained. The act of Congress, so frequently referred to, declares, in effect, that the judgment of courts of each State shall have the *same* effect as they would have where rendered; no less, no greater."

"The comments of courts of eminent respectability, given at length above, sufficiently indicate what this means.

If the allegations as to jurisdiction could not be disputed in the sister State, they must be conclusive throughout the Union. In other words, the rule in relation to domestic judgments must be applied, as well to this question as to the question of merits, unless it should be proved that the law of

the sister State upon the subject is different from the domestic law." *And see note 9, on same page.*

The author concludes, *page 237:* "We should, then, state the rule to be, that, where the record contains an allegation of specific facts, sufficient to constitute jurisdiction, parties and privies are estopped to deny jurisdiction in a suit for the same cause of action; unless the record would be inconclusive upon an action upon the judgment in the State in which it was rendered"

While we content ourselves mainly with asking the attention of the Court to the cases cited in *Bigelow on Estoppel, in chap. 6*, referred to above, we desire to call especially the attention of the Court to the case of *Westcott vs. Brown, 13 Indiana Rep., page 83*, which is *directly* in point, and is cited by the learned Judge of the court below, on *page 38, folio* 100, *of Record.* In that case, *page 85*, the court say: "Where the record of a court of general jurisdiction, on its face, shows that the defendant was personally served with process, or personally appeared to the action, * * * the record is, in that respect, conclusive, and he is estopped from denying the jurisdiction of the court over his person." *And see authorities cited on same page of Record.*

In *Wiley vs. Pratt et al., 23 Ind., 628*, the court go still further, and on page 633, say: "We think the rule should be stated thus: Where a judgment is recovered in a court of general jurisdiction against a defendant, and the record shows that an attorney of the court appeared for the defendant and filed an answer, the jurisdiction of the court cannot be controverted, unless it be by proof of fraud, which we are not in this case required to decide, or that the defendant was not a citizen of the State, *nor, during the pendency of the proceedings, within the jurisdiction of the court in which the judgment was rendered*, and had neither been notified of the pendency of the suit, nor had given authority to the attorney to enter an appearance for him."

In *Shelton vs. Tiffin et al., 6 How.* 163, Mr. Justice McLean, in pronouncing the opinion of the court, says, that where the record recites the appearance of a party (not served with process) by attorney, the party may show that he never authorized such appearance; *and on page* 168, "This evidence does not contradict the record, but explains it. The appearance was the act of the counsel, and not the act of the court. *Had the entry been that L. P. Perry came personally into court and waived process, it could not have been controverted.*"

In *Lincoln vs. Tower, 2 McLean C. C. Rep.*, 473, Mr. Justice McLean, reviewing Starbuck vs. Murray, says:

"*It must be admitted that the proposition assumes the fact to be established. The fact is that the defendant was served with process, or appeared to the action; and this the record asserts. And the plaintiff insists that this, being a fact which is matter of record, cannot be denied by a plea.*

But this, says Justice Marcy, assumes the fact to be proved. Most certainly it does. The fact is proved by the highest evidence. It is not to be questioned in any court." See also *Wilcox vs. Kassick, 2 Mich.*, 165, the conclusions in which case are stated in *Bigelow on Estoppel, page* 234, and numerous cases cited—among others, *Hampton vs. McConnell*, 3 *Wheaton*, 234.

" Marshall, C. J., delivered the opinion of the court. This " is precisely the same case as that of Mills vs. Duryee, 7, c " 481. The court cannot distinguish the two cases. The " doctrine there held was that the judgment of a State court " should have the same credit, validity and effect in every oth ' court of the United States which it had in the State where it ' was pronounced, and that whatever pleas would be good to a ' suit thereon in such State, and none others, could be pleaded ' in any other court in the United States."

It would seem that the above construction of the decision of the Court in *Mills vs. Duryee 7, Cranch 481,* by the distinguished Chief Justice of the court that rendered that decision, might have enabled some of the State Courts to avoid that '*confusion of opinion*' on the question under discussion that some of them claim exsists.

Parol evidence would not be received in the original action, in either of the States whose decisions are referred to by Counsel for plaintiff in error, to contradict the return of the Sheriff, that he has personally served process upon defendent.

If not admissible in the original action, how much less can the return of the Sheriff, incorporated into the record of a court of general jurisdiction, be contradicted by parol testimony, in an action in which that record is introduced and relied upon.

We claim then, that the weight of authority establishes:

That in cases where the record of a court of general jurisdiction is open to explanation by parol testimony; among other things, it must be pleaded and shown, or offered to be shown by evidence, that defendant was *not* from the commencement of the action to the rendition of judgement therein, within the jurisdiction of the court rendering that judgement.

That where it appears by the return of the Sheriff incorporated into the record, (as in this case) that defendant was personally served with process, he cannot be heard to deny that return.

3. As to the third point of plaintiff in error, the court below has sufficiently answered it, *page 14 latter part of folio 38 et seq. 39 and 40.*

The cases cited from *9th and 17th Indiana Reports, 11th Mississippi, and 6th Texas, in page 22 of brief of plaintiff in error,* have no other application to a case like this, than that

they sustain the conclusion of the court below in its decision, *page 15 folio 40 of record.*

The summons need not state the sum claimed in the action and such statement, if made, is surplusage; see page 350, Ind Rev. Stat. 1852.

"The relief granted to the plaintiff if there be no answer, cannot exceed the relief demanded in his complaint." *See 380 page 123, 2 vol. Rev. Stat. Ind. 1852.*

4. The judgement of the court below should be sustained.

F. R. E. CORNELL,
Counsel for Deft. in Error.

Rail Road Co. 16-65
v.
Church

This is a motion and not among the Records